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AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XXX.

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AMERICAN STATE REPORTS.

VOL. XXX.

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AMERICAN STATE REPORTS
VOL XXX

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

ALABAMA GREAT SOUTHERN R. R. Co. v. SELLERS.

[98 ALABAMA, 2.]

EXEMPLARY DAMAGES. — IF A CONDUCTOR OF A RAILWAY COMPANY, acting within the range of his employment, after having passed a station without allowing a passenger to alight, willfully refuses to return with the train to such station, and compels the passenger, who is a woman encumbered with her baby and baggage, to alight, in a driving rain, two hundred yards from such station, and from any shelter, whereby she is unnecessarily exposed to the elements while walking that distance, to the injury of her health, this misconduct on the part of such conductor is such willful wrong, and is accompanied with such reckless disregard of consequences, necessarily injurious, as authorizes the jury to award exemplary damages.

PLEADING — DAMAGES FOR CARRYING PASSENGER BEYOND HIS STATION. — When, in an action against a railroad corporation, the complaint alleges wrong and negligence in failing to stop at a station to permit a passenger to alight, and that after such station was passed, the conductor refused to return to it, and directed the passenger to get off in a driving rain, the damages recoverable cannot be limited to those arising from the failure to stop at the station in the first instance, but include those resulting from the refusal to return, and from directing plaintiff to alight in the rain.

DAMAGES. — EVIDENCE THAT THE PLAINTIFF HAD HER INFANT IN HER ARMS when, after being taken past her station, her request that the train return to such station was refused, and she was directed to get off in a driving rain, where there was no shelter, is admissible, because it tends to aggravate the wrong of the conductor in requiring the plaintiff to leave the train where there was neither station nor shelter.

PLEADING. — AN AVERMENT THAT THE PLAINTIFF WAS PUT OFF, OR COMPELLED TO GET OFF, of a railway train at a point beyond the station of her destination may be supported without proof of the use of force, as by evidence showing that after carrying plaintiff past such station the conductor of the train refused to return thereto, and directed plaintiff to

alight, and it was necessary to leave the train to avoid being carried a still greater distance from the station.

RAILROAD CORPORATIONS. — A PASSENGER ON A FREIGHT TRAIN is entitled to be set down at the station to which he has purchased a ticket, and may recover damages for being carried beyond such station and compelled to alight several hundred yards therefrom in a driving rain, and at a place where there was no shelter, precisely the same as though the train were one used exclusively for passengers.

DAMAGES. — EXEMPLARY damages may be awarded, though the actual injury suffered was nominal.

RAILROAD CORPORATIONS — EXPULSION FROM TRAIN. — One does not necessarily leave a train voluntarily, though no actual force is employed to put him off. He may be coerced by the direction of the conductor that he alight, and by the fact that if he does not do so, he will be carried still farther beyond the station of his destination.

Wood and Wood, for the appellant.

Hewitt, Walker, and Porter, for the respondent.

McCLELLAN, J. The inquiry of chief importance in this case is, whether there was any testimony adduced which, if believed, would have authorized the imposition of exemplary damages. We think there was such testimony. The plaintiff (appellee here) testified, in her own behalf, that she purchased a ticket entitling her to transportation on a freight train of the defendant from Jonesboro to Wheeling, stations on defendant's road about two miles apart, and took passage on such train at Jonesboro; that at Wheeling there was a house used as a station-house by all passengers to and from that point over defendant's line, and at which defendant's trains carrying passengers were wont to stop for the purpose of receiving and discharging passengers; that on the occasion in question the train was not stopped at said station, but proceeded from two hundred to four hundred yards beyond it; that it was raining at the time; that plaintiff requested the conductor to move the train back to the house, but he pretended not to hear, and told plaintiff she must get off; that the rain increased and was falling heavily, and a high wind was prevailing when she did get off; that she had a young baby in her arms, and was otherwise encumbered with a valise; that because of these impediments she could not efficiently use an umbrella which she had; that she alighted, in obedience to the direction of the conductor, in this driving rain, and walked back to the station-house, getting thoroughly wet, and in consequence became quite sick, and was so for three months. The testimony of the conductor goes to show

that the house in question was used as a station-house by his company, and even on the evidence of the plaintiff there can be no doubt that it was the duty of the defendant to stop this train at the house, and allow passengers to alight there, notwithstanding the house belonged to another company: *Louisville etc. R. R. Co. v. Johnston*, 79 Ala. 436. If the jury believed the testimony we have detailed, they would have been justified in the conclusion that defendant's conductor, within the range of his employment, willfully refused to move the train back to the station, and willfully compelled the plaintiff to alight, in a driving rain, several hundred yards from any shelter, so encumbered with her child and baggage as to be unable to protect herself, and necessitating exposure to the elements while walking this distance. We cannot hesitate to affirm that this misconduct on the part of defendant's employee, with knowledge of the situation, was such a willful wrong, committed in such reckless disregard of the necessarily injurious consequences to the plaintiff, as authorized the jury to punish the defendant therefor by the imposition of exemplary damages: *New Orleans etc. R. R. Co. v. Hurst*, 36 Miss. 660, 668, 669; 74 Am. Dec. 785; *Wilkinson v. Searcy*, 76 Ala. 176; *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; *post*, p. 28.

2. The most casual reading of the complaint suffices to demonstrate that while each of its counts avers defendant's wrong and negligence in failing in the first instance to stop its train at Wheeling, neither of them bases plaintiff's claim for damages on that omission of duty, but on the contrary, they each seek to recover for damages resulting from the refusal of the conductor to return to the stopping-place, and the consequent necessity, accentuated by the expressed directions of the conductor, for plaintiff to alight beyond the station, "in a hard and drenching rain," and to walk back through the rain to the point at which she should have been set down. One or more of the requests for instructions involved a construction of the complaint confining the recovery to damages sustained in consequence of a failure to stop in the first instance, and for this reason were properly refused.

3. Evidence that plaintiff had her infant in her arms when she alighted from the train was objected to, and is made the basis of an assignment of error here. The position of appellant in that regard is untenable. Manifestly, this testimony legitimately tended to aggravate the willful wrong of the con-

ductor in requiring the plaintiff to get off in the rain at the considerable distance from any shelter shown in the case; and this whether regard is to be had to the infant *per se*, or the mother's natural solicitude for it, or whether it be regarded only as one of the impediments which disabled the plaintiff from protecting herself in some measure from the rain.

4. The position taken in some of the charges requested for the defendant and refused, that there could be no recovery under the first or second counts, unless force was used by the conductor in getting plaintiff off the car,—those counts averring that she was “put off,” and “compelled to get off,” respectively,—is untenable. If she alighted in consequence of the implied refusal of the conductor to return to the station, to avoid being carried on, and in obedience to the direction of the conductor to do so, she acted under compulsion which was the equivalent of being put off, or compelled to get off; and the court properly charged the jury that the allegations in this regard did “not necessarily equal or mean the application of force to remove the plaintiff from said train.”

5. It is no doubt true, as asserted in some of the charges requested for defendant, that persons who “apply for and receive transportation on freight trains are not entitled to the comforts and conveniences usually furnished passengers on passenger trains”; but that proposition has no bearing on any issue of fact in this case. No injury is claimed or was sustained by reason of any difference there may be in the “comforts and conveniences usually furnished passengers” on these different classes of trains. The wrong and injury counted on resulted from a failure to transport the plaintiff from Jonesboro to the depot at Wheeling, with or without certain comforts and conveniences, and in compelling her to alight at a distance from the point at which she had contracted to be set down; and there can be no sort of doubt that whether the vehicle used by the carrier to perform the contract of carriage be of one or the other character hypothesized, its duty to set the passenger down at the end of the journey is precisely the same. These charges were abstract, and well refused on that ground.

6. There are respectable authorities which appear to hold that exemplary damages cannot be awarded when the actual injury is purely nominal; the theory being, that as exemplary damages are laid in conservation of the interests of society, which for this purpose are considered “as blended with the

interests of the individual," where the individual is injured only nominally, or not at all in fact, though his rights are violated, "the interests of society have virtually nothing to blend with," and hence "the individual having but a nominal interest, society can have none," etc.: *Stacy v. Portland Pub. Co.*, 68 Me. 287. This view is specious, but, we apprehend, not sound. The true theory of exemplary damages is that of punishment, involving the ideas of retribution for willful misconduct, and an example to deter from its repetition. The position of the supreme court of Maine can be sustained in principle, it seems to us, only by assuming that which is manifestly untrue, namely, that no act is criminal which does not inflict individual injury capable of being measured and compensated for in money. Many acts denounced as crimes by our statutes, or by the common law, involve no pecuniary injury to the individual against whom they are directed, and which, while the party aggrieved could not recover damages as compensation beyond a merely nominal sum, are yet punished in the criminal courts, and may also be punished in civil actions by the imposition of "smart-money"; and on the same principle, acts readily conceivable which involve malice, willfulness, or wanton and reckless disregard of the rights of others, though not within the calendar of crimes, and inflicting no pecuniary loss or detriment measurable by a money standard on the individual, yet merit such punishment as the civil courts may inflict by the imposition of exemplary damages. And upon these considerations, the law is, and has long been, settled in this state, that the infliction of actual damage is not an essential predicate to the imposition of exemplary damages: *Parker v. Mise*, 27 Ala. 480; 62 Am. Dec. 776; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148; *Alabama etc. R. R. Co. v. Heddleston*, 82 Ala. 218. See also 1 Sutherland on Damages, 748. The charges requested by the defendant, to the effect that actual damage must be shown before punitive damages could be recovered, were therefore properly refused.

Charge No. 8, refused to defendant, was misleading, when referred to plaintiff's testimony. It tended to induce the jury to the conclusion that if no actual force was employed by the conductor to put the plaintiff off the train, she left it voluntarily, and this notwithstanding she may have acted under the compulsion resulting from the conductor's failure and implied refusal to move the train back to the station, and from

his direction to passengers to alight where the car stood. There was no error in its refusal.

7. Charges 9 and 10, requested by defendant, were argumentative, in that they direct the jury to look to certain facts as tending toward certain conclusions. That numbered 9, moreover, is subject to the same objection taken to No. 8, *supra*,—its tendency is to mislead the jury; and that numbered 10 is bad for the further reason that it confines the right of recovery to injury resulting from defendant's negligence in passing the station, when, as we have seen, the wrong and injury really complained of consisted in a failure to move the train back to the stopping-place, and the consequent necessity plaintiff was under to alight and walk back in the rain.

Charge 11, requested for defendant, was properly refused, because not supported by any tendency of the testimony. There is no evidence in this record to the effect that "plaintiff could have been cured of the sickness in ten days," etc., as hypothesized in this request.

The rulings of the court on charges not above referred to by number are all considered in the general propositions of law we have announced. The record is free from error, and the judgment is affirmed.

EXEMPLARY DAMAGES, WHEN ALLOWED. — This subject is fully discussed in the extended note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 883, and references to other notes in the American Decisions are there given. The circumstances in *Samuels v. Richmond etc. R'y Co.*, 35 S. C. 493, 28 Am. St. Rep. 483, were very similar to those in the principal case, and the court there stated the rule to be, that a tort sounding in exemplary damages exists when some right or property of a person, natural or artificial, is invaded maliciously, violently, wantonly, or with reckless disregard of social or civil obligations. Exemplary damages will not be allowed for failure to stop a train at a station and give a passenger opportunity to alight therefrom, unless the failure to stop was willful, or the wrong was aggravated in some manner by the railroad company or its employees: *Dorrah v. Illinois Central R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629; *Kansas City etc. R. R. Co. v. Fite*, 67 Miss. 373. An instruction that if any of the employees of the company were "insulting in words, tone, or manner," the jury should find for the plaintiff damages, in their discretion, "not exceeding the amount claimed in the petition," was held proper in an action by a female passenger to recover for an injury resulting from being taken past a station to which she had purchased a ticket: *Louisville etc. R. R. Co. v. Ballard*, 88 Ky. 159. For a case in which exemplary damages were refused to a passenger carried past his station, see *Mississippi etc. R. R. Co. v. Gill*, 66 Miss. 39.

RAILROAD COMPANIES — FORCIBLE EXPULSION, WHAT IS. — On principle, it would seem that the compulsion in this class of cases need not be stronger

than that "constraint of the will arising from the unlawful presentment of a choice between two comparative evils," which is the definition of legal duress given in *Alston v. Durant*, 2 Strob. 257; 49 Am. Dec. 596. A passenger, whether right or wrong in any contention or misunderstanding with a conductor, is under no duty, either legal or moral, to remain on the train until the conductor appeals to force for the execution of his commands in expelling him. If the passenger obeys the command to leave the train, and thereby does an act to which his own will does not consent, he is coerced: *Georgia R. R. etc. Co. v. Eakew*, 86 Ga. 641; 22 Am. St. Rep. 490. Whether the circumstances are such as to be held a coercion in leaving the train is a question for the jury: *Galveston etc. R'y Co. v. Crispi*, 73 Tex. 236.

FREIGHT TRAINS — RIGHTS OF PASSENGERS ON: See notes to *Central R. R. Co. v. Smith*, 2 Am. St. Rep. 39, 40; *Rosenbaum v. St. Paul etc. R. R. Co.*, 8 Am. St. Rep. 656; *McVeety v. St. Paul etc. R. R. Co.*, 22 Am. St. Rep. 729. The general rule is, a person permitted to ride upon a freight train by the company's servants is entitled to the same rights as if he were riding on a passenger train: *McGee v. Missouri etc. R'y Co.*, 92 Mo. 206; 1 Am. St. Rep. 706.

WESTERN UNION TELEGRAPH CO. v. WILSON.

[93 ALABAMA, 32.]

TELEGRAPH CORPORATIONS. — A PERSON TO WHOM A TELEGRAM IS ADDRESSED may recover damages for delay in its transmission or delivery if the sender was acting as his agent and the corporation had notice of that fact.

TELEGRAPH CORPORATIONS. — DAMAGES FOR MENTAL SUFFERING arising from the failure to promptly transmit a telegram can be recovered, provided there was other ground of damage, either nominal or substantial, though an action cannot be sustained for mental suffering alone.

TELEGRAPH CORPORATIONS — PLEADING. — A complaint alleging that the defendant was a public telegraph corporation, and that W. J. Wilson, for the benefit and as the agent of the plaintiff, delivered to the defendant the following message: "Howard, Ga., April 27, '90. To W. L. Wilson, Childersburg, Ala. Father died this P. M. Come at once. W. J. Wilson,"—for transmission to plaintiff by telegraph, and that plaintiff's said agent paid defendant the price of such transmission, that such message was promptly transmitted to defendant's office to which it was addressed, but was not delivered until after the lapse of the day on which it should have been delivered, sufficiently discloses a contract between plaintiff and defendant, for the breach of which at least nominal damages are recoverable.

SUNDAY. — A TELEGRAPH CORPORATION CANNOT ESCAPE LIABILITY for the failure to promptly deliver a telegram on the ground that the contract for its transmission and delivery was entered into on Sunday, if the emergency to which the telegram related was the death and burial of the father of the person to whom it was addressed.

Hewitt, Walker, and Porter, for the appellant.

Cecil Browne, contra.

McCLELLAN, J. In the case of *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, damages were claimed by the sendee of a telegram for a breach of contract alleged to have been entered into between the senders, as the agents of the sendee, and the telegraph company, whereby the company, for a consideration paid by the agents, undertook and promised to transmit and deliver the message. It was insisted for defendant that the action could be maintained only by the senders, the theory of the contention being, that the complaint showed that the senders made the contract in their own name, and it not being a contract for the payment of money, they alone had a right to maintain the suit. The court said: "This point is well taken, if the proper construction of the complaint is that which is contended for: Code 1876, sec. 2890; Code 1886, sec. 2594; *Johnson v. Martin*, 54 Ala. 271; *Masterson v. Gibson*, 56 Ala. 56; *Agnew v. Leath*, 63 Ala. 345. It is certainly true that the message proposed to be sent, as copied in the complaint, is signed by Renfro Brothers, the senders. But the message is not the contract declared on. The complaint avers, in substance, that the plaintiff made the contract through his agents, Renfro Brothers. The contract declared on, we suppose, was oral. It is not averred that it is in writing. If, in delivering and paying for the message to be forwarded, Renfro Brothers disclosed the name of their principal for whom they were acting, that constituted it plaintiff's contract, upon which he can and should sue in his own name. Such proof is admissible under the complaint as framed, and if made, will sustain the averment." On a like state of averment, this principle was reaffirmed in the case of *Kennon v. Western Union Tel. Co.*, 92 Ala. 399, the action being in the name of the persons to whom the message was sent by their agents, under an agreement for transmission made between them and the telegraph company, in which it was said: "On the contract thus alleged, these plaintiffs may sue; and if the evidence develops that they were disclosed to the telegraph company as the principals in the contract, they may recover against the defendant." In such cases, the plaintiff, upon making the requisite proof as to the fact of the agency of the senders, and the disclosure of that fact to the defendant at the time of contract made, would be entitled to recover at least nominal damages for the breach of the contract thus existing between him and the defendant, and in addition thereto, damages for mental anguish and suf-

fering occasioned by the defendant's failure to comply with its undertaking in respect of prompt transmission and delivery: *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148.

But the law appears to be well settled, that in the absence of the element of damages resting on a breach of contract in force at the time between the parties, and in the absence of any actual injury to the person, reputation, or estate of the plaintiff, there can be no recovery for injury to the feelings; or in other words, than an action cannot be maintained solely for mental sufferings, though if other ground of damage, either nominal or substantial, be averred and proved, such averment and proof constitute an essential predicate for the imposition of damages for lacerated feelings, by way only of aggravation of actual damages: *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; *Johnson v. Wells, Fargo, & Co.*, 6 Nev. 224; 3 Am. Rep. 245; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303; *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; *Canning v. Williamstown*, 1 Cush. 451.

In the case at bar, one of the questions presented by the demurrers is, whether the complaint alleges a contract between the plaintiff and the defendant, for the breach of which at least nominal damages are recoverable, so as to make such right of recovery the basis for the imposition of further damages for mental distress, which are claimed. We think such contract is laid in the complaint, not by direct averment, it is true, but by the averment of facts from which the law implies a contract, and upon proof of which the existence of the contract would be declared. It is alleged that the defendant "was engaged in the business of transmitting messages for hire by means of electricity, from Howard, in the state of Georgia, to Childersburg, in the state of Alabama, and was then and there a public telegraph company; and being so engaged, W. J. Wilson did, for the benefit and as the agent of plaintiff, deliver to defendant at its office in Howard the following message, viz., 'Howard, Ga., April 27, '90. To W. L. Wilson, Childersburg, Ala. Father died this P. M. Come at once,' signed 'W. J. Wilson,' for transmission to plaintiff by telegraph at Childersburg, and plaintiff's said agent did then and there pay defendant the sum of forty cents, the price of transmitting and delivering said message. Said W. J. Wilson was the brother of plaintiff, and the person mentioned in said message as 'father' was the father of both W. L. and W. J.

Wilson, and said defendant was well aware of all such relationship." It is not in terms alleged that the defendant received and undertook to transmit and deliver this message, but both these facts sufficiently appear from the allegations that defendant did transmit the dispatch promptly to its office at Childersburg, and there delivered it to W. L. Wilson, the plaintiff, though not until after the lapse of a day from the time at which it should have been delivered. These averments import an acceptance of the message by the defendant necessary to a complete contract for its being sent to Childersburg and there promptly delivered to the plaintiff, even within the strict rule laid down in *Somerville v. Merrill*, 1 Port. 107, relied on by the appellant's counsel; and the complaint, taken as a whole, adequately states a contract entered into between the plaintiff, through his agent, and the defendant, for the failure of the defendant to comply with which, alleged in the complaint, plaintiff was entitled to recover at least nominal damages, and such damages for distress of mind, resulting from the delay of delivery, whereby he was prevented seeing the body of his father and being present at his funeral, as from the terms of the message must have been in the contemplation of the parties. The demurrers, which proceeded on the theory that plaintiff was without right to sue for a breach of this contract, and that damages for mental suffering were not recoverable in this action, were properly overruled: Authorities *supra*; *Western Union Tel. Co. v. Brown*, 71 Tex. 723; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. 530, and note; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 672; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623.

There is no merit in the objection that the complaint does not allege that the message was in writing. We need not decide whether it would be the duty of defendant company to receive for transmission a verbal message,—doubtless a rule on its part to the contrary would be a reasonable one,—nor whether the complaint does in effect allege this message to have been in writing, though its averments might well be construed to import that the message as delivered by plaintiff's agent was a written one. These considerations are rendered immaterial by the averments of the complaint that the message, whether verbal or written, and whether or not there was any duty to receive it as offered resting on the defendant, was

received and correctly transmitted to its office at the point of destination; and it cannot now be heard to excuse itself for unreasonable delay in delivering it from that office on the ground that it was under no obligation to receive it in the first instance.

The objection taken by the demurrer that the complaint shows the contract for transmission and delivery of the telegram to have been made on Sunday, and is therefore void, is untenable. We cannot doubt but that the emergency of the death and burial of one's father involves such moral necessity for his presence before and at the funeral as brings any contract made to that end on Sunday within the exception of cases of necessity made by our statute, if indeed such contracts would not also be within the exception in favor of works of charity, in a liberal sense of that term: *Burns v. Moore*, 76 Ala. 339; 52 Am. Rep. 332; *Gulf etc. R'y Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 269; *Doyle v. Lynn etc. R. R. Co.*, 118 Mass. 195; 19 Am. Rep. 431.

The foregoing considerations dispose of the objections taken to the trial court's rulings on the demurrers interposed by the defendant below, which alone are presented for review on this appeal. Those rulings are free from error, and the judgment is affirmed.

TELEGRAPH COMPANIES — RIGHT OF RECEIVER OF MESSAGE TO SUE. — In *Western U. Tel. Co. v. Allen*, 66 Miss. 549, an extract from which is given in the note to *Alexander v. Western U. Tel. Co.*, 14 Am. St. Rep. 563, the court stated that the universal doctrine in America was, that an action might be maintained by the receiver as well as the sender of a message, while in England only the sender could sue. To the same effect are *Wadsworth v. Western U. Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Western U. Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109; *Young v. Western U. Tel. Co.*, 107 N. C. 370; 22 Am. St. Rep. 883.

DAMAGES FOR MENTAL SUFFERING are, as a general rule, not recoverable, unless the mental suffering is an accompaniment of bodily injury, or unless the injury from which it results was attended by circumstances of malice, insult, or oppression: See note to *Western U. Tel. Co. v. Nations*, 27 Am. St. Rep. 918. In Texas, Indiana, and Tennessee, such damages can be recovered, apart from the infliction of any bodily injury: See cases cited in above note.

SUNDAY — WHAT WORK MAY BE DONE ON. — The issuing, publishing, and circulating a newspaper on Sunday is not a work of necessity or charity, and a contract regarding advertisements in such newspaper is void as long as the statute prohibiting all works except those of necessity or charity remains in force: *Hendy v. St. Paul etc. Co.*, 41 Minn. 188; 16 Am. St. Rep. 695. Traveling on the Lord's day may be justified on the ground of necessity or as a deed of charity: *Buck v. Biddeford*, 82 Me. 433, in which it was held

that the act of taking home a woman who was visiting plaintiff's house on a cold, windy day in December, and told him that she had got to go home that night, was not unlawful. Riding on Sunday for exercise, and for no other purpose, is not a violation of the statute in relation to the Lord's day: *Sullivan v. Maine Central R. R. Co.*, 82 Me. 196, where a woman was injured by being thrown from a wagon on a defective railroad crossing. The following extract from the opinion of the court may be usefully quoted: "This exception [i. e., works of necessity or charity] may properly be said to cover everything which is morally fit and proper, under the particular circumstances of the case, to be done upon the sabbath. Tested by this rule, our own court, in *O'Connell v. Lewiston*, 65 Me. 34, 20 Am. Rep. 673, and *Davidson v. Portland*, 69 Me. 116, 31 Am. Rep. 253, has held that walking in the open air upon the sabbath, for exercise, is not a violation of the statute. In other jurisdictions, also, it has been held not to be unlawful to ride to a funeral: *Horne v. Meakin*, 115 Mass. 326; walking to prepare medicine for a sick child: *Gorman v. Lowell*, 117 Mass. 65; riding to visit a sick sister: *Cronan v. Boston*, 136 Mass. 384; traveling to visit a sick friend: *Doyle v. Lynn etc. R. R. Co.*, 118 Mass. 195; 19 Am. Rep. 431; a servant riding to prepare needful food for her employer: *King v. Sarage*, 121 Mass. 303; a father riding to visit his two boys: *McClary v. Lowell*, 44 Vt. 116; 8 Am. Rep. 366; walking for exercise: *Hamilton v. Boston*, 14 Allen, 475; and walking partly for exercise and partly to make a social call: *Barber v. Worcester*, 130 Mass. 74."

ALABAMA GREAT SOUTHERN R. R. CO. v. FRAZIER.

[93 ALABAMA, 45.]

PRACTICE — ERROR WITHOUT PREJUDICE. — If two pleas are in legal contemplation the same, and the court sustains a demurrer to one and allows the other to stand, the defendant is not injured thereby.

NEGLIGENCE — WILLFUL INJURIES. — A PLEA OF THE CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF IS INSUFFICIENT when the complaint alleges that injuries were willfully inflicted upon plaintiff by one of defendant's employees while acting within the scope of his employment.

DAMAGES. — EXEMPLARY DAMAGES MAY BE ALLOWED AGAINST A RAILWAY CORPORATION FOR AN ASSAULT AND BATTERY on the person of the plaintiff by defendant's brakeman, because the plaintiff, though not rightfully on the train, would not undertake to get off while it was running at such a rate of speed as to render the attempt hazardous.

RAILROAD CORPORATION'S LIABILITY FOR ACTS OF BRAKEMAN. — If a brakeman is sent by the conductor to inform a person on the train that he must get off, which the brakeman does, and such person not complying with the demand that he get off, because the speed of the train was such as to render any attempt to leave it dangerous, the brakeman, in the presence of the conductor, thereupon commits an assault and battery on such person to coerce his will so that he would get off, the act of the brakeman is within the line of his duty, and the corporation is answerable therefor.

RAILROAD CORPORATION IS ANSWERABLE FOR WILLFUL MISCONDUCT OF ITS EMPLOYEE, if he, while acting within the range of his employment, does an act injurious to another, either through negligence, wantonness, or

intention; but if he go beyond the range of his employment, and of his own will do an unlawful act injurious to another, his employer is not liable therefor.

EVIDENCE — RES GESTA. — In an action against a railroad company to recover damages for an assault and battery committed by a brakeman on a person not rightfully on the train, in which he claims that the assault was without justification or palliation, and the brakeman that it was committed under apprehension of an attack by the plaintiff, all that occurred between plaintiff on one hand and the conductor and brakeman on the other — the manner, language, and conduct of the parties just before and leading up to the assault — constitute part of the *res geste*, and evidence of them is admissible.

EVIDENCE. — Plaintiff may be permitted to state that he was insisting "in a pleasing manner" that he be allowed to continue his journey, when an assault and battery upon him by a brakeman is attempted to be palliated or justified on the ground that an attack by the plaintiff on the brakeman was apprehended by the latter when he made such assault.

EVIDENCE OF PERMANENCY OF INJURIES. — One who was injured nearly two years before the trial, and whose injuries are of such a character as to be known to him, though he is not an expert, is competent to testify as to whether he was permanently injured or not.

DAMAGES — WHAT PLAINTIFF WAS MAKING at the time he received injuries, by which he was disabled for a considerable time, may be proved as an element of the damages he sustained.

JURY TRIAL — PRACTICE. — If a COURT INSTRUCTS A JURY TO DISREGARD EVIDENCE which had been received against objection and exception, the exception is thereby vitiated, and the error in admitting the evidence is no longer available in any appellate proceeding.

JURY TRIAL. — If OBJECTIONABLE STATEMENTS AND ARGUMENTS ARE MADE BY COUNSEL, which he subsequently withdraws, and which the court instructs the jury to disregard, they do not constitute grounds for a new trial. Such statements or arguments cannot be reviewed or otherwise considered upon appeal, when it is admitted that the trial court committed no error in respect to them, and ruled properly when its attention was directed thereto.

JURY TRIAL — EXEMPLARY DAMAGES. — An instruction to a jury, that if they find from the evidence that vindictive damages should be given, they have the right to give such damages as the evidence authorizes, not beyond the amount claimed in the complaint, is a correct statement of the rule for the guidance of juries in the assessment of punitive damages.

JURY TRIAL — WITNESSES FALSE IN ONE PARTICULAR. — Instruction that if the jury believe from the evidence that certain witnesses swore falsely in one particular, they were authorized to disregard the evidence of such witnesses entirely, is proper, when it appears that all the evidence of such witnesses was material.

JURY TRIAL — WITNESSES, PREPONDERANCE OF. — Instruction that the jury are not to be controlled by the mere numerical preponderance of witnesses on one side or the other, but should consider such preponderance along with other facts and circumstances conducing to credence, or the reverse, is proper.

EVIDENCE. — BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE of the plaintiff rests upon the defendant.

EVIDENCE — BURDEN OF PROOF. — If, in an action for an assault committed on the plaintiff by a brakeman of a railway train, the defendant pleads that the force used was necessary to remove the plaintiff from the train, the defendant must assume the burden of proving the necessity of the force employed.

William H. Denson and L. A. Dobbs, for the appellant.

Dortch and Martin, contra.

McCLELLAN, J. This is an action by Frazier, against the Alabama Great Southern Railroad Company sounding in damages for injuries willfully inflicted by one of defendant's brakemen while acting within the scope of his employment.

1. Plea No. 1 "denies each and every allegation, statement, and averment" of the complaint. The general issue, presented by the second plea of "not guilty," is made by statute the equivalent of a denial of all the material allegations of the complaint: Code, sec. 2675. The issue presented by the two pleas, therefore, is one and the same. If the court erred in sustaining a demurrer to the first plea, it was without injury to the defendant, since it had all the advantages under the second plea to which it was entitled under the first: *Louisville etc. R. R. Co. v. Davis*, 91 Ala. 487, and citations. Moreover, the two pleas being in legal contemplation the same, one of them was redundant, and might well have been stricken out on this ground.

2. To this action, counting upon the willful misconduct of defendant's employee, the contributory negligence of plaintiff, relied on in plea No. 3, is no defense. The insufficiency of that plea was correctly adjudged on demurrer: Beach on Contributory Negligence, 49, 50, 53; *Louisville etc. R. R. Co. v. Watson*, 90 Ala. 68; *Montgomery etc. R. R. Co. v. Stewart*, 91 Ala. 421.

3. The complaint makes a case for punitive damages. It charges an assault and battery on the person of plaintiff by defendant's brakeman, upon no other provocation than that the plaintiff, while expressing a readiness to get off the train if it were stopped, declined to do so while it was running at such a rate of speed as to render the attempt hazardous. The train was one which, under the regulations and orders of the company, was not allowed to transport passengers. The plaintiff knew this when he boarded it, but was anxious to get to Chattanooga, and relied upon persuading the conductor to transport him in violation of the rules of the company. He

appears to have so continued to rely upon his powers of persuasion as not to have availed himself of an opportunity to alight while the train was stationary, even after both the brakeman and the conductor had assured him he must do so. The conductor's orders were, to allow no person without a pass, other than employees of the road, to ride on that train. Plaintiff was not an employee, nor had he a pass. He was confessedly a trespasser, and it became the duty of the conductor to eject him.

Common knowledge, and the uncontroverted evidence in this case, concur to the point that brakemen on trains are under the control of the conductor, and that it is their duty to obey his orders, and to aid him in maintaining the rules of the service, and in executing the orders of their common master. Similarly, common knowledge and the testimony here leave no room to doubt that a part of a brakeman's duty is to eject, or to assist in the ejection of, trespassers from trains, the conductor having determined against their right to continue on board. Nothing, indeed, is more common than for a conductor to summon a brakeman to deal with and eject refractory trespassers; it is the usual, if not the universal, course. It was adopted in this instance. The brakeman who committed the assault and battery testifies that he was not in charge of the train, and hence, presumably, had no voice in determining that the plaintiff should be put off. That was the part of the conductor. He did so determine, and sent this brakeman to the caboose to inform plaintiff that he must get off. The brakeman swears that he went down to the caboose and delivered the message, and that his intention was to put him off if he resisted. Plaintiff insisted upon being allowed to proceed. Presently the conductor came in, and he continued to so insist. Both conductor and brakeman were present from this time until the plaintiff left the train, and throughout the altercation and difficulty in which the injuries complained of were received. Both were insisting that he should get off. The brakeman testifies, and there is nothing in this record to the contrary, that "if a party got on, and got rough, it was my duty to help put them off, if they resisted or would not get off; and I was putting this party off according to my duty." He admits taking hold of plaintiff, in the discharge of his duty, in the presence of the conductor, and without objection on the latter's part. It was in this effort to put plaintiff off the train that, on the aspect of the evidence

presented by defendant's witness, the assault was committed. From plaintiff's testimony the conclusion is, that the assault and battery was committed, not in an effort to remove him bodily from the car, but to coerce his will so that he would get off. Upon either aspect, we cannot hesitate in reaching the conclusion that whatever was done by the brakeman was within the line of his duty to his employer, the defendant.

The rule as to the liability of railway companies for injuries resulting from the willful misconduct of employees is, "that if the employee, while acting within the range of the authority of the employment, do an act injurious to another, either through negligence, wantonness, or intention, then, for such abuse of the authority conferred upon him, or implied in his employment, the master or employer is responsible in damages to the person thus injured. But if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not": *Gilliam v. South and North Ala. R'y Co.*, 70 Ala. 268, and authorities cited; *Louisville etc. R. R. Co. v. Whitman*, 79 Ala. 328. Here, as we have seen, it was the brakeman's duty to put the plaintiff off the train. Whatever he did to that end was within the range of that duty and authority. He had a right to use such force as was reasonably necessary to the discharge of that duty. If he employed more force than was necessary, and injury resulted, the company is liable. If, during his effort to discharge this duty, he willfully assaulted and beat the plaintiff, — not in self-defense against an assault made, or to reasonable apprehension imminent and impending, by the plaintiff, — the company is liable.

4. There is really no conflict in the evidence as to the fact of the assault, the injury inflicted thereby, or as to its having been committed by the brakeman within the range of the authority of his employment. The only material controverted question of fact is as to whether the assault was justified or, in view of the claim of vindictive damages, palliated by the conduct of the plaintiff. Upon plaintiff's testimony, it was willful and wanton, wholly without justification or palliation. On the aspect of the evidence adduced by defendant; it was committed under a reasonable apprehension of an immediate deadly attack by plaintiff on the conductor or brakeman. To the issues of fact thus presented, all that occurred and was said between the plaintiff on the one hand and the conductor

and brakeman on the other, — the manner, language, and conduct of the parties, as being violent and threatening, or pacific and submissive, — in and during the conversation, just before and leading up to the assault, was pertinent and competent as *res gestæ* of the main fact, giving character thereto, and furnishing the jury *data* by which to determine whether the assault was justified or necessary to the discharge of the duty which was on the brakeman to eject the plaintiff, or if not justified, whether it was committed under circumstances of provocation which would palliate the wrong of the employee, and mitigate the punishment of the employer. These considerations serve to determine all of the exceptions to the admission of what was then said and done, and of the manner with which it was said and done, against the appellant.

5. The special objection to that part of plaintiff's account of this conversation in which he says he was insisting "in a pleasant manner" that he be allowed to continue his journey, etc., is equally untenable: *Carroll v. State*, 23 Ala. 28; 58 Am. Dec. 282; *Raisler v. Springer*, 38 Ala. 703; 82 Am. Dec. 736; *South and North Ala. R. R. Co. v. McLendon*, 63 Ala. 266.

6. The fifth assignment of error is addressed to the action of the trial court overruling an objection to a question as to what the brakeman, on going into the caboose, intended to do in case the plaintiff refused to get off. This question was not answered, and the error, if any, of allowing it to be put was without injury: *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; 56 Am. Rep. 31; *Billingslea v. State*, 85 Ala. 323.

7. The injury which plaintiff suffered was a double fracture of the lower jaw-bone. The trial was had nearly two years after the injury was received. Whatever abnormal condition of the bone existed at that time — being after the wound had entirely healed, and the bones had knit together — must have been permanent in its nature, and of such character as to be known to the plaintiff, though he was not an expert. Hence our opinion is, that there was no error in allowing the plaintiff to testify as to whether his jaw was permanently injured, or as to how it was affected at the time of the trial.

8. The injury having for a considerable length of time disabled the plaintiff to carry on the business in which he was engaged at the time of receiving it, it was manifestly competent for him to prove, as an element of the damages he sustained, "what he was making at the time" he was disabled:

Alabama etc. R. R. Co. v. Yarbrough, 83 Ala. 238; 3 Am. St. Rep. 715.

9. The court sustained plaintiff's objections to several questions propounded to him as a witness by the defendant, the purpose of which was to show what the plaintiff was earning per month at the time of the trial, and that the injury of which he complained did not disable him "to work on a salary," as he was doing when he was hurt. If it be conceded that these rulings were erroneous, the error was cured by the subsequent action of the court reversing its first ruling, and admitting testimony which substantially answered all of the originally excluded questions: *Cleveland v. State*, 86 Ala. 1.

10. On the other hand, certain evidence, that of the witnesses Jones and Burkill, in regard to a conversation between the latter and Horton, while they were under the rule, was admitted against defendant's objection, and subsequently excluded by the court, and the jury instructed to disregard it entirely. This final action of the court vitiated the exceptions reserved to its original action: *Jordan v. State*, 79 Ala. 9; *Dis-mukes v. State*, 83 Ala. 287.

11. Like considerations lead to the conclusion that the exceptions reserved to certain arguments advanced by plaintiff's counsel will not avail the appellant. The objectionable statements and expressions of the counsel were withdrawn, and the court instructed the jury to disregard them. It is the settled doctrine of this court that proceedings thus infected with error by arguments outside of the record may be purged of the infirmity by disclaimer and withdrawal on the part of counsel, and care on the part of the court in cautioning the jury against according to them any consideration or influence. It is the action of the trial court, and not that of counsel, which alone can be reviewed on appeal; and the action of the court in this instance was entirely proper, and in full compliance with the motion of defendant. The objection here insisted on was taken to counsel's argument, and not to any ruling of the court invoked or made with respect to it: *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571; *Cross v. State*, 68 Ala. 476; *East Tennessee etc. R. R. Co. v. Bayliss*, 75 Ala. 466; *Nelson v. Harrington*, 72 Wis. 591; 7 Am. St. Rep. 900.

12. Of the charges given at the instance of the plaintiff, that numbered 1 is a correct statement of the rule for the guidance of juries in the assessment of punitive damages. They may give such punishment as, in their judgment, the

evidence authorizes, not in excess of the sum sued for: *Louisville etc. R. R. Co. v. Whitman*, 79 Ala. 328.

13. Several charges were given for the plaintiff which were to the effect that if the jury believed from the evidence that certain witnesses for the defendant swore willfully falsely in one particular, they were authorized to disregard the evidence of such witnesses entirely. There is no evidence of either of these witnesses in this record which is not material to the issues presented. The charges must be construed with reference to the evidence with respect to which they are given: *Holland v. Tennessee Coal, Iron, and R. R. Co.*, 91 Ala. 444. So construed, the supposed infirmity of the instructions, resulting from their failure to expressly base the right of the jury to disregard the testimony of these witnesses upon the willful false swearing in a material particular, is eliminated. The particular referred to must have been a material one, since no immaterial evidence had been drawn from the witnesses in question. The legal proposition asserted in these charges is sound. The jury are not instructed or led to conclude that they must disregard all the witnesses' testimony because they find it to have been willfully false in some material part, but only that they may do so; in other words, they have the right or are authorized to do so. The proposition is so fully supported by our own adjudications as not to require extended discussion: *Childs v. State*, 76 Ala. 93; *Jordan v. State*, 81 Ala. 20; *Lowe v. State*, 88 Ala. 8.

14. Charges 3 and 12, given at the instance of the plaintiff, are sound expositions of the doctrine that in reaching a conclusion upon any controverted issue of fact, the jury are not to be controlled by the mere numerical preponderance of the witnesses on one side or the other, but should consider such preponderance only along with all other facts and circumstances conducing to credence, or the reverse, in the testimony of the witnesses on either hand: *Alabama Fert. Co. v. Reynolds*, 79 Ala. 497; *Life Association v. Neville*, 72 Ala. 517.

15. Charges 7 and 8 of plaintiff's series are to the effect that, under the issue presented by the third plea, the burden was upon the defendant. The only plea bearing that number found in the record is that which sets up the contributory negligence of the plaintiff as a defense to the action, and it is well settled that the *onus* under such plea is on the defendant: *Montgomery etc. R'y Co. v. Chambers*, 79 Ala. 338. But as we have seen, a demurrer was sustained to the third plea; and

we infer that the charges in question have reference to a plea which appears to have been subsequently filed, and is the third in fact of the pleas which were in the case through the trial, though it is numbered 4 in this record. This is a plea in confession and avoidance, in effect. Without denying the violence alleged in the complaint, it avers that plaintiff had no right to be on the train, that he refused to get off, that defendant's agent undertook to and did remove him, and that the force used was necessary to that end. The gist of this plea is its affirmative averment that the force was necessary to the performance of a lawful act. It involved no traverse of any fact alleged or necessary to be alleged by the plaintiff. It was not for him to allege or prove that the violence done to his person was not necessary to his removal from the train. Notwithstanding the plea, recovery could have been had by plaintiff without any negation of that necessity. It was a fact outside of his case, and only injected into the controversy by the defendant, who was not entitled to a verdict on account of it without proof of its existence. The application of the test that the party who, if no proof is offered on a given issue, will be defeated on that issue is the party having the burden with respect thereto must result in sustaining the action of the trial court in giving these charges: 2 Am. & Eng. Ency. of Law, 655, 656, and notes; 3 Brickell's Digest, 433.

16. Several other charges were given at the instance of plaintiff, and excepted to. These exceptions are not attempted to be supported in the arguments of counsel; and it will suffice to say with respect to them, that while the infirmities of being abstract and argumentative may infect some of them, no reversible error is involved in the action of the court in giving them to the jury.

Many charges requested by the defendant were refused. Of these the first and second were general charges against any right of recovery, and against a liability for exemplary damages. What is said in the first paragraphs of this opinion serves to determine the exceptions to the action of the circuit court on these requests adversely to the appellant.

Charges 3, 4, 5, 6, 7, and 8 of the defendant's series, as numbered on this transcript, each assert propositions at war with the view we have expressed as to the defendant's liability for injuries willfully inflicted upon a trespasser by a brakeman while acting within the range of his duty to remove persons from a train which was forbidden, by the regulations of

the company, to transport passengers, the removal being determined upon by the conductor; and all of them were properly refused. Charge 9 asserts that the company is not liable if a brakeman willfully struck and injured the plaintiff without any demand or direction from the conductor so to do. To have given this instruction would have been the emasculation of the salutary and well-established doctrine, that whether the willful misconduct of the employee was authorized or ratified by the company or not, and whether it was directed by a superior employee or not, the company is responsible if it was committed in the line or within the range of the authority of the employment, as that authority or duty existed on the facts incident to the particular transaction. Here the conductor had determined to put the plaintiff off. It became at once, according to the uncontroverted evidence, the brakeman's duty to assist in putting him off, and to use the necessary force to that end. He undertook to discharge that duty in the presence and with the concurrence of the conductor; and in discharging it he willfully beat the plaintiff, according to one aspect of the evidence. The company was manifestly liable, whether he was directed or commanded by the conductor to beat him or not, and the charge was well refused. Charge 10, requested by defendant, was clearly abstract, and well refused on that ground. There was no evidence in the case tending to show "that the brakeman struck the plaintiff in personal resentment of some insult offered him by the plaintiff"; and even had that been the fact, we are not prepared to say but that the defendant would still be liable, if the insult was incident to the brakeman's efforts to remove him from the car, though we need not and do not decide this.

There is no error in the record, and the judgment of the circuit court is affirmed.

APPEAL — HARMLESS ERRORS. — There will not be a reversal for harmless, immaterial errors: See cases cited in the note to *Blanchard v. Lake Shore etc. Ry Co.*, 9 Am. St. Rep. 638. Thus where a complaint contains irrelevant and redundant averments, they should be stricken out on motion; but the refusal to strike them out is not reversible error, unless it affirmatively appears that prejudice results thereby to defendant: *Columbus etc. Ry Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58. So, also, sustaining a demurrer to a special plea, if error at all, is error without injury, when the same defense is equally available under the general issue, which was also pleaded: *Manning v. Maroney*, 87 Ala. 563; 13 Am. St. Rep. 67; or when the defense is available under another special plea: *Louisville etc. R. R. Co. v. Hall*, 87

Ala. 708; 13 Am. St. Rep. 84; compare *Shreffler v. Nadelhoffer*, 133 Ill. 536; 23 Am. St. Rep. 623.

NEGLIGENCE — WILLFUL INJURIES. — Contributory negligence does not bar a recovery, when defendant was guilty of wantonness or willful neglect: See notes to *Brannen v. Kokomo etc. Gravel Road Co.*, 7 Am. St. Rep. 411; and *Harris v. Clinton*, 8 Am. St. Rep. 849.

LIABILITY OF RAILROAD COMPANIES FOR TORTS OF SERVANTS: See cases cited in the note to *International etc. R'y Co. v. Anderson*, 27 Am. St. Rep. 907.

RAILROAD SERVANTS. — WHAT ARE BRAKEMAN'S DUTIES, EVIDENCE TO SHOW: See *St. Louis etc. R'y Co. v. Hendricks*, 48 Ark. 177; 3 Am. St. Rep. 220.

RAILROAD COMPANIES. — Trespassers upon train cannot be ejected therefrom without a reasonable regard to their safety: *Arnold v. Penn. R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542, and note; but they may be ejected at a place other than a station, provided they are not wantonly exposed to peril of serious injury: *Hardenbergh v. St. Paul etc. R'y Co.*, 39 Minn. 3; 12 Am. St. Rep. 610.

EXEMPLARY DAMAGES: See note to *Alabama Great Southern R'y Co. v. Sellers*, ante, p. 22.

EVIDENCE. — **RES GESTÆ** mean the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character: *Hermes v. Chicago etc. R'y Co.*, 80 Wis. 590; 27 Am. St. Rep. 69, and note.

WITNESSES — ADMISSIBILITY OF OPINIONS OF NON-EXPERTS. — One who was in attendance on an injured person, and saw his apparent condition, may, although not an expert, give testimony as to the extent of the injured person's suffering: *Heddles v. Chicago etc. R'y Co.*, 77 Wis. 228; 20 Am. St. Rep. 106. In *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401, the rule is stated as follows: "Common observers, having a special opportunity for observation, may testify to their opinions as conclusions of fact, although they are not experts, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending and understanding"; cited with approval in *Atchison etc. R. R. Co. v. Miller*, 39 Kan. 419. Another authority states the rule, with less precision, thus: A non-expert witness cannot give an opinion, except where it is derived from facts known to him, and disclosed by him to the jury: *In re Blood*, 62 Vt. 359. Unless the facts have fallen under the personal observation of the witness, his opinion is not admissible as evidence: *Village of Shelby v. Claggett*, 46 Ohio, 549; *Harris v. Detroit City R'y Co.*, 76 Mich. 227; *Trinity etc. R'y Co. v. Lane*, 79 Tex. 643 (cases of personal injuries). A hypothetical state of facts is therefore not an allowable basis for the opinion of a non-expert witness: *Grant v. Raleigh etc. R. R. Co.*, 108 N. C. 463. The admissibility of such evidence rests in the necessity of the case, and it is only in those matters where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, that a witness can be allowed to supplement his description by his opinion, to put the jury in a position to determine the facts in issue. If the circumstances are such that they can be fully and accurately described to the jury, and their bearing on the issue estimated by persons without special knowledge or training, opinions of wit-

nesses, expert or other, are inadmissible: *Graham v. Pennsylvania Co.*, 139 Pa. St. 149; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Whittier v. Franklin*, 46 N. H. 23; 88 Am. Dec. 185; *Shelley v. Austin*, 74 Tex. 608. Thus on the question of mental capacity, the opinion of non-expert witnesses is often received: *Williams v. Spencer*, 150 Mass. 346; 15 Am. St. Rep. 206; *In re Blood*, 62 Vt. 659. Nor is it necessary that the acquaintance of non-expert witnesses with a person whose mental capacity is in question should be extensive or intimate; it is enough if the acquaintance is such as to enable the witness to form some opinion: *Johnson v. Culver*, 116 Ind. 278. So, from necessity, opinions as to value are received in evidence; but in all cases, before the reception of such evidence, it must be made to appear that the witness is in possession of such information as will enable him to form an intelligent opinion: *Southern Pacific Co. v. Maddox*, 75 Tex. 300; *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379; *Hangen v. Hachemeister*, 114 N. Y. 566; 11 Am. St. Rep. 691; *Williams v. Williams*, 82 Mich. 449. In *Alt v. California Fig Syrup Co.*, 19 Nev. 118, the necessity of the case caused this rule to be somewhat relaxed, for, the plaintiff having sued for the value of his services in the preparation of a proprietary medicine, it was held that as the process of manufacturing the medicine was known only to him and one other person, non-expert witnesses, though unacquainted with the process, might give their opinion as to the value of the services. So any intelligent witness who has been accustomed to observe moving objects is competent to testify as to the rate of speed of a moving train: *Guggenheim v. Lake Shore etc. R. R. Co.*, 66 Mich. 150; *Louisville etc. R. R. Co. v. Hendricks*, 128 Ind. 462. So a witness may state his opinion derived from certain facts, when the facts themselves are incapable of exact and minute description; e. g., that a horse appeared tired; that tracks appeared to have been made by a sleigh or an overshoe: *State v. Ward*, 61 Vt. 153. But among the exceptions to the rule which ordinarily excludes the opinion of a witness when offered as evidence will not be included the long time which has elapsed since the occurrence of the matters about which the witness is called to testify. So held in a case where it was sought to establish a lost deed, and the question was as to its sufficiency to pass title: *Shiflet v. Morelle*, 68 Tex. 382. The opinions of non-expert witnesses are to be weighed by the facts upon which they are based: *Fiscus v. Turner*, 125 Ind. 47.

DAMAGES FOR PERSONAL INJURIES, ELEMENTS OF: See, generally, note to *Heddes v. Chicago etc. R'y Co.*, 20 Am. St. Rep. 114. The loss or diminution of capacity to follow one's business is a proper subject for compensation: *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175; *Gulf etc. R'y Co. v. Wilson*, 79 Tex. 371; 23 Am. St. Rep. 345. In *Masterton v. Mount Vernon*, 58 N. Y. 391, cited in *Bierbuch v. Goodyear Rubber Co.*, 54 Wis. 208, 41 Am. Rep. 19, it was held that "the plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and if he could, the compensation usually paid to persons doing such business for others," but that the jury ought not to be permitted "to speculate as to the uncertain profits of commercial ventures in which the plaintiff, if uninjured, would have been engaged."

IMPROPER ARGUMENTS OF COUNSEL, WHEN GROUND FOR REVERSAL OF JUDGMENT: See note to *McDonald v. People*, 9 Am. St. Rep. 559-570. It is error to permit counsel, in arguing before a jury, to state and comment upon facts not in evidence, against the objection of the opposite party, and the error is not corrected by an instruction to disregard all statements of the

jury not supported by evidence, unless it is found as a fact that the error was harmless: *Cross v. Grant*, 62 N. H. 675; 13 Am. St. Rep. 607.

DAMAGES BEYOND THE AMOUNT STATED IN THE COMPLAINT CANNOT BE ALLOWED: *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254.

WITNESSES—THE MAXIM, FALSUS IN UNO, FALSUS IN OMNIBUS.—When a witness willfully swears falsely to any material matter, the jury may disregard the whole of his testimony: *Owens v. Kansas City etc. R'y Co.*, 95 Mo. 169; 6 Am. St. Rep. 39.

CONFLICTING EVIDENCE—PREPONDERANCE OF WITNESSES.—The proposition that if the witnesses are equal in credibility, the greater number must prevail, is unsound. The jury must determine what witnesses are entitled to the most influence, when the testimony is conflicting; and this they may do from various considerations: the manner, expression, and intelligence, and who are likely to be best informed, from their situation and intelligence: *Jones v. State*, 13 Tex. 168; 62 Am. Dec. 550; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208; 41 Am. Rep. 19.

CONTRIBUTORY NEGLIGENCE.—BURDEN OF PROVING contributory negligence is in all cases on the defendant: *Georgia Pac. R'y Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47; *Comer v. Consolidated Coal etc. Co.*, 34 W. Va. 533; *Northern Pac. R. R. Co. v. O'Brien*, 1 Wash. 599; *Bradwell v. Pittsburgh etc. R'y Co.*, 139 Pa. St. 404. This rule arises from the fact that contributory negligence is a matter of defense, plaintiff not being obliged to allege that he is free from fault: *Young v. Shickle etc. Iron Co.*, 103 Mo. 324. In many states, however, the contrary view is taken: See extended notes to *Prideaux v. City of Mineral Point*, 28 Am. Rep. 563–567; *Buesching v. St. Louis Gas Light Co.*, 39 Am. Rep. 511–515. A recent case adopting the doctrine that plaintiff must show himself free from negligence is *Coughtry v. Willamette St. R'y Co.*, 21 Or. 245. But though the doctrine was thus broadly expressed in this case, where a person was injured while on a railroad track, the admittedly perilous position of a person who thus exposes himself to the chances of being struck by a train may perhaps enable us to refer it to the principle that when the plaintiff's evidence is of such a character that the jury would be justified in finding that his own negligence contributed to the injury, the burden of proof will rest upon him to overcome the effect of the testimony: See *Durrell v. Johnson*, 31 Neb. 796. This principle has been applied to the case of persons injured at railway crossings: *Brickell v. New York etc. R. R. Co.*, 120 N. Y. 290; 17 Am. St. Rep. 648; *Cincinnati etc. R'y Co. v. Howard*, 124 Ind. 280; 19 Am. St. Rep. 96. When the plaintiff's evidence thus tends to show contributory negligence, it is error to instruct the jury that "the law presumes that he exercised ordinary care": *Rapp v. St. Joseph etc. R'y Co.*, 106 Mo. 423. When it appears that a fatal injury was received by a railroad employee while acting in disobedience to a regulation of the company, the burden of proof will rest upon his widow or personal representative, in an action for damages, to show that he was without fault, or that defendant was in fault: *Prather v. Richmond etc. R. R. Co.*, 80 Ga. 427; 12 Am. St. Rep. 263. The plaintiff's own evidence may sometimes be sufficient to establish contributory negligence, and then it is the duty of the trial court to declare the result to the jury as a matter of law: *Hudson v. Wabash etc. R'y Co.*, 101 Mo. 13.

EVIDENCE—BURDEN OF PROOF.—The general rule is, that party setting up an affirmative defense has the burden of proof to show it true: *Little Pittsburg etc. Mining Co. v. Little Chief etc. Mining Co.*, 11 Col. 223; 7 Am. St. Rep. 226.

RICHMOND AND DANVILLE R. R. Co. v. VANCE.

[93 ALABAMA, 144.]

PLEADING — NEGLIGENCE. — In an action against a railroad company for injuries caused in operating the road, the plaintiff need not aver the particular defect in the condition of the track or machinery in which the negligence consisted.

JURY TRIAL — WHETHER A WITNESS SHALL BE PERMITTED TO BE RECALLED by the plaintiff for the purpose of allowing a predicate for his impeachment by proof of contradictory statements, is a matter of discretion not reviewable on appeal.

DAMAGES. — EXEMPLARY DAMAGES MAY BE AWARDED IN AN ACTION AGAINST A RAILROAD CORPORATION for personal injuries received, if the negligence was of such a character and degree as to evince a grossly careless disregard of the safety of the public. Hence such damages may be awarded when injuries have been received by a passenger from the derailment of a train, and every other cross-tie within twenty-five to thirty feet was so rotten that the spikes could be pulled out by hand, and had been in this condition for at least two weeks, and there was evidence tending to show that the condition of such ties was known to the officers of the defendant.

DAMAGES. — EXEMPLARY DAMAGES ARE NOT RECOVERABLE FOR MERE NEGLIGENCE.

DAMAGES. — EXEMPLARY DAMAGES should not be awarded against a railway corporation because of the derailment of a train on account of rotten cross-ties, aided by a broken bolt, if there is no evidence that defendant's officers or agents knew of any defect in the bolt. When an injury is produced by the co-operation of two independent causes, the existence of one of which is unknown, and the other is insufficient to produce the result without the co-operation of the unknown cause, knowledge of the existence of the other cause does not make a case for the allowance of punitive damages.

ACTION by Mrs. Vance to recover for personal injuries received from the derailment of a train on which she was a passenger. The defendant excepted to the following instruction of the trial court: "If the jury believe from the evidence that the cross-ties were in a rotten condition, and that such rotten condition proximately contributed to throw the train from the track, then it is for them to say whether or not the cross-ties were in such condition as that a careful inspection would have apprised the defendant that they were in a defective condition; and if the jury find that the cross-ties were in such defective condition, and that careful inspection would have informed the defendant of it, and that the defendant was negligent in and about allowing the track to remain in that condition, then they are authorized, under this complaint, to find that the defendant was negligent in and about the track and ties." "Also, that the law allowed the jury, in

some cases, in addition to actual damages, to assess damages by way of punishing the defendant; that such damages are allowed when it appears that the defendant's act which caused the injury was not merely negligent, but was recklessly negligent, or of a willful character, or when the injury was intentionally inflicted; and that the jury may, in such cases, go further than the assessment of actual damages, and increase the verdict by way of punishing the defendant." The defendant excepted to the refusal of the court to submit the following instructions to the jury: 1. "The defendant admits that there was a defect in one of the bolts which held together the parts of the switch, and claims that this defect wholly caused the accident, but that it was a hidden defect, not discoverable by the use of due care on the part of the defendant's servants who were charged with the duty of inspecting and keeping it in repair; and that no defect was discoverable by the use of due care when it was placed in the switch; and if the jury believe this is true, as shown by the evidence, their verdict should be for the defendant." 2. "There is no evidence in this case that the persons in charge of defendant's train were guilty of any negligence producing or contributing to plaintiff's injuries." 3. "If the jury believe the evidence, they must find for the defendant, under the second count." 4. "Under the allegations of the complaint, the condition of those parts of the railroad track apart from and not connected with the switch itself cannot be considered by the jury as evidence of negligence on the part of the defendant." 9. "If the jury believe the evidence, they are bound to find that the defendant exercised due care originally in the selection and construction of the switch, and of the iron bolts which formed part of it." 12. "If the jury believe the evidence, they cannot assess any punitive damages against the defendant." 16. "If the jury believe from the evidence that the coach, or the rear trucks of the coach, were not derailed in any way, except by leaving the main line and running into the siding at the point of the switch, and that the condition of the cross-ties and rails at that point, though defective, was not sufficiently defective to have produced such a result, except by the aid of the broken bolt which has been testified about, they cannot assess punitive damages against the defendant." 17. "The first count of the complaint charges that the accident which injured plaintiff was caused by a defect or defects in the switch at the point where the coach in which plaintiff was traveling left

the track, and some defect or defects in the switch itself is thus claimed by plaintiff to have caused the accident; and if the jury believe from the evidence that the cross-ties on the track, at or about the switch, were not a part of the switch, then, whatever may have been their condition at the time, the jury cannot consider it as tending to show negligence on the part of the defendant."

James Weatherly, for the appellant.

Bowman and Harsh, for the respondent.

CLOPTON, J. Appellee sues to recover damages for personal injuries received while a passenger in defendant's cars. The complaint contains two counts. The first avers that the negligence consisted in failure to keep in good and safe condition the switch at the point of the accident. The second alleges no special acts or omissions as constituting the negligence; it avers, generally, "that the defendant did not use due and proper care or skill in and about carrying plaintiff as a passenger as aforesaid, but so negligently and unskillfully conducted itself in that behalf, and in conducting, managing, and directing the coach in which plaintiff was such passenger, and the engine whereby said train was drawn upon and along said railway, that the coach which contained plaintiff was shaken and wrecked as aforesaid." The first eleven assignments of error go to the refusals of the court to exclude the testimony of various witnesses as to the condition of the cross-ties within thirty feet of the switch.

The second count is a substantial copy of the second count of the complaint in the case of the *Louisville and Nashville R. R. Co. v. Jones*, 83 Ala. 376, from which it was evidently taken. In that case it was held that the defects of structure, or want of repairs, need not be averred with more particularity than was found in the second count of the complaint. This was on the principle that under our system of pleading a party complaining of injury caused by the negligence of the company operating a railroad need not aver the particular defects in the condition of the track or machinery in which the negligence consists, these being considered as peculiarly in the knowledge of the officers or agents of the company. Under such general averments, evidence of defects in the track at or so near the place of the accident as to afford reasonable inference that they proximately contributed to the injury is admissible. For the same reason, charges 4 and 17, asked by

the defendant, which proceed on the theory that such evidence is not admissible under the complaint, were properly refused.

2. Whether the court should have permitted or refused to permit the witness Hood, who had been examined on the part of defendant, and cross-examined, to be recalled by plaintiff, for the purpose of laying the predicate for his impeachment by proof of contradictory statements, was a matter of discretion, and not revisable in this court: *State v. Marler*, 2 Ala. 43; 36 Am. Dec. 398; *Bell v. State*, 74 Ala. 420.

3. The most material question in the case arises on the charges relative to punitive damages. The rule settled in this state is, that exemplary damages may be awarded in an action against a railroad company for personal injuries received, when the negligence is of such character and degree as to evince a grossly careless disregard of the safety of the public, or, what is of equivalent import, recklessness, wantonness, or willfulness: *South and North Ala. R. R. Co. v. McLendon*, 63 Ala. 266. The uncontroverted testimony shows that the engine, baggage-cars, second-class coach, and the front trucks of the rear coach safely passed the switch, continuing on the main line, and that the rear trucks of the rear coach ran up the switch on the side-track. There is evidence tending to show that every other cross-tie within twenty-five or thirty feet of the switch was so rotten that the spikes could be pulled out with the hand, and that they had been in this condition for two weeks previously. There was also evidence tending to show that the superintendent and division-master inspected that part of the road and the switch two or three days prior to the accident, found nothing the matter with the switch, and most of the ties good, occasionally a defective one; also, that the section-master had recently put in some ties at that place. There was other evidence tending to show that the accident was caused by the breaking of a bolt which held the switch in position after being thrown.

4. Conceding that the cross-ties were defective, as stated by plaintiff's witnesses, the failure to remedy the defects, if the officers or agents of the company were ignorant thereof, was simple negligence, which does not authorize the allowance of punitive damages. Consciousness of the existence of such defective condition, and that the derailment of the car might or would be the probable consequence thereof, is an essential constituent of the degree of negligence evincing a

reckless indifference to consequences, or a wanton or willful infliction of injury. The terms "recklessness," "wantonness," and "willfulness," *ex vi termini*, imply this much. This view accords with the principle announced in *Georgia Pac. R'y Co. v. Lee*, 92 Ala. 262: "Willful and intentional wrong, a willingness to inflict injury, cannot be imputed to one who is without consciousness, from whatever cause, that his conduct will inevitably or probably lead to wrong and injury." The application of the principle in that case is stated as follows: "In the case at bar, this consciousness could not exist on the part of defendant's employees, until they knew plaintiff's wagon and team were in a position of danger, and no degree of ignorance on their part of this state of things, however reprehensible in itself, could supply this element of conscious wrong, or reckless indifference to consequences, which, from their point of view, would probably or necessarily ensue." This, it must be admitted, does not strictly harmonize with the expression in the opinion in *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764, to the effect: "We are satisfied that it [the evidence] tended to show a condition of the track, not to know and remedy which was such gross negligence on the part of the company as implied recklessness and wantonness, such indifference to the probable consequences of its continued use, such disregard of the safety of passengers being transported over it, as is the equivalent of intentional wrong, or a willingness to inflict the injuries complained of." The conclusion in that case, sustaining the refusal of the court to charge that under the evidence the plaintiff could not recover punitive damages, was correct. The inaccuracy of the expression quoted consists in making the omission to discover and remedy the bad condition of the track — simple negligence — the equivalent of consciousness of the probable consequences, instead of saying that such consciousness might be inferred from the evidence. The opinions in both cases were prepared by the same justice, the latter being a virtual modification of the expression above quoted in accordance with the views therein expressed. In the present case, there is evidence from which, if believed, knowledge of the defective condition of the cross-ties may be inferred, and for this reason charge 12, asked by defendant, was properly refused.

Defendants further requested the court to charge that punitive damages cannot be assessed, if "the coach or rear trucks

of the coach were not derailed in any way, except by leaving the main line, and running into the siding at the point of the switch, and that the condition of the cross-ties and rails at that point, though defective, was not sufficiently defective to have produced such a result, except by the aid of the broken bolt." There is evidence tending to show that the breaking of the bolt was the real cause of the derailment; and there is no evidence that the defendant's officers or agents knew of any defect in the bolt, or from which such knowledge can be inferred; hence no evidence tending to show, or from which the jury would be authorized to infer, reckless, wanton, or intentional negligence in respect to the bolt. When referred to the evidence, the proposition of the charge is, that when an injury is produced by the co-operation of two independent causes, the existence of one of which is unknown, and the other insufficient to produce the result without the co-operation of the unknown cause, knowledge of the existence of such other cause does not make a case for the allowance of punitive damages. The proposition seems logically to follow from the principle that consciousness of the probable injurious consequences of one's conduct, or omissions of duty, is an essential element of reckless, wanton, or intentional negligence. If the cross-ties were not so defective that the defendant ought to have reasonably anticipated the derailment of the train as the probable consequence thereof, and it would not have occurred but for the intervention of the breaking of the bolt, the defective condition of which was unknown and not suspected,—if the condition of the ties would not itself have probably produced the injury,—it can scarcely be said that consciousness of the probable derailment of the coach at that point, such as evinces a reckless indifference to consequences, is inferable from mere knowledge of such condition of the ties. Consciousness of the probable consequences cannot be said to exist, unless there be knowledge of a cause or causes naturally calculated to produce them. The charge should have been given.

We discover no error in the other rulings of the court.

Reversed and remanded.

PLEADING — NEGLIGENCE. — In a suit for damages against the party whose negligence was the cause of the death, a general averment of damages is sufficient: *Louisville etc. R'y Co. v. Buck*, 116 Ind. 566; 9 Am. St. Rep. 883.

JURY TRIAL — RECALLING AND RE-EXAMINING WITNESSES. — A witness may be recalled to lay a foundation for his impeachment as to statements

made by him subsequently to the time when he gave his testimony, although he had been discharged as a witness: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552. Permitting the re-examination of a witness is an exercise of discretion which the appellate court will not review: *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122. But when the object of recalling a witness is to lay the foundation for proving his declarations out of court, it must, in Pennsylvania, always be allowed, and if refused, and if proof of the witness's declarations be rejected because he had no previous opportunity of explanation, it is error: *Cowanhan v. Hart*, 21 Pa. St. 495; 60 Am. Dec. 57.

EXEMPLARY DAMAGES: See *Alabama etc. R'y Co. v. Sellers*, ante. p. 17, and *Alabama etc. R'y Co. v. Frazier*, ante, p. 28, and the notes thereto. Grossly negligent or malicious acts are the subject of damages, resting in the discretion of the jury, uninfluenced by prejudice or passion: *Seely v. Alden*, 61 Pa. St. 302; 100 Am. Dec. 642. Measure of damages in torts committed through mistake, ignorance, or mere negligence is compensation only; but in such as are committed willfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely, but may, if the evidence justifies it, award vindictive or exemplary damages: *Pittsburgh etc. R'y Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517. Compare *Avinger v. South Carolina R'y Co.*, 29 S. C. 265; 13 Am. St. Rep. 716; *West v. Western U. Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530. But it is error to charge the jury that they should give punitive damages if they find willful neglect. The amount rests in their own discretion: *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135.

ROSS v. PARKS.

[93 ALABAMA, 152.]

SPECIFIC PERFORMANCE OF A UNILATERAL CONTRACT may be decreed, if it is fair, just, and reasonable, and the party sought to be charged has so bound himself as to meet the requirements of the statute of frauds, and the other party has elected to treat the contract as binding, and to enforce it.

SPECIFIC PERFORMANCE. — POSSESSION OF THE REAL PROPERTY, the title to which complainant seeks to obtain by a bill for specific performance, is not essential to sustain the jurisdiction of the court to award the relief prayed for.

SPECIFIC PERFORMANCE. — A VENDEE OF ONE WHO HAS AGREED TO SELL OR CONVEY REAL PROPERTY may, unless he is a purchaser in good faith and without notice, be compelled to perform the contract of his vendor.

AN OPTION given by the owner of land for a valuable consideration, whether adequate or not, agreeing to sell it to another at a fixed price if accepted within a specified time, is binding upon the owner and all his successors in interest with knowledge thereof.

AN OFFER CONTAINED IN AN OPTION cannot be withdrawn or revoked within the time designated therein.

J. E. Brown, and Watts and Son, for the appellants.

D. D. Shelby and L. W. Day, contra.

COLEMAN, J. A general rule governing cases for specific performance is, that the contract must be mutual, and that either party is entitled to the equitable remedy of a specific performance. Exceptions to this general rule are well established, and one class of contracts to which the exceptions may be applied are those which are unilateral in form: 1 Pomeroy on Specific Performance, secs. 167, 168.

The exception as to unilateral contracts has been fully recognized and adopted in this state. The case of *Moses v. McClain*, 82 Ala. 370, was for a specific performance of the following contract: "For and in consideration of the sum of one dollar in hand paid, I hereby give A. J. Moses an option on my lands and improvements situated near Sheffield, and known as my home place, containing one hundred and twenty acres, more or less, for the sum of eight thousand dollars. . . . This option good for two days"; signed "J. W. McClain." It was contended that as Moses, the covenantee, bound himself by no writing, and not having bound himself, he could not, in this proceeding, hold McClain bound; that the contract not being mutually binding, chancery will not compel its specific performance. The court declared as follows: "Mutuality is frequently said to be one of the conditions of a rightful suit for specific performance. The authorities, however, do not carry it to the length contended for. Where the contract is fair, just, and reasonable in all its parts, and the party sought to be charged has so bound himself as to meet the requirements of the statute of frauds, the election of the other contracting party to treat the contract as binding, and to enforce it, meets all the requirements of the rule"; citing *Wilks v. Georgia Pac. R. R. Co.*, 79 Ala. 180; 3 Pomeroy's Eq. Jur., sec. 1405, and notes; Wait on Specific Performance, sec. 201; *Cherry v. Smith*, 3 Humph. 19; 39 Am. Dec. 150.

The case of *Johnston v. Trippe*, 33 Fed. Rep. 530, is an authority directly on the point in question, — the contract being almost identical in its provisions. The different authorities are very generally quoted and commented on in this case, and the conclusion the same as held by this court.

The evidence fails to show that there was such forcible entry and unlawful detainer as to deprive complainant of his right to file a bill to remove a cloud from title, but the equity of the bill does not depend upon that principle. The complainants, holding the equitable title, bring their bill to compel a conveyance of the legal title by those who hold it in trust

for them. In such a case the jurisdiction in no wise depends upon possession: *Gray v. Jones*, 14 Fed. Rep. 83; *Shipman v. Furniss*, 69 Ala. 562; 44 Am. Rep. 528.

The doctrine is well settled that when the vendor, after entering into a contract of sale, conveys the land to a third person who has knowledge or notice of the prior agreement, such grantee takes the land impressed with the trust in favor of the original vendee, and holds it as trustee for such vendee, and can be compelled, at the suit of the vendee, to specifically perform the agreement by conveying the land, in the same manner and to the same extent as the vendor would have been liable to do had he not transferred the legal title: 1 Pomeroy on Specific Performance, sec. 465, and note. The same rule is declared in *Dickinson v. Any*, 25 Ala. 424; *Meyer v. Mitchell*, 75 Ala. 475.

It may be stated as a sound principle of law, if an owner of land, in writing, gives another an option on it for a valuable consideration, whether adequate or not, agreeing to sell it to him at a fixed price if accepted within a specified time, it is binding upon the owner, and upon those who purchase from the owner with a knowledge of such agreement: *Moses v. McClain*, 82 Ala. 370; *Johnston v. Trippe*, 33 Fed. Rep. 530; *Mauil v. Vaughn*, 45 Ala. 134, and authorities.

Under such circumstances, the fixed time is a material part of the contract, and when supported by a valuable consideration, the owner of the land cannot revoke the offer before the time has expired within which the offer may be accepted. We do not declare that if no specified definite time was fixed by the parties, and the contract of offer was not supported by a valuable consideration, such an offer could not be revoked. We express no opinion upon this question: *Johnston v. Trippe*, 33 Fed. Rep. 530; *Wilks v. Georgia Pac. Ry Co.*, 79 Ala. 185; *Falls v. Gaither*, 9 Port. 617; *Cherry v. Smith*, 3 Humph. 19; 39 Am. Dec. 150; 1 Story on Contracts, sec. 496; 1 Parsons on Contracts, sec. 481, p. 511; Bishop on Contracts, sec. 825; Benjamin on Sales, sec. 42.

We find no error in the decree of the chancellor, and it is affirmed.

SPECIFIC PERFORMANCE. — The right to the specific performance of a contract rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances: *Miles v. Dover Furnace etc. Co.*, 125 N. Y. 294. Equity will not decree specific performance, unless the terms of the contract are clear and certain, capable of ascertainment from the instrument

itself, and such as to afford the parties mutuality of remedy: *Ballou v. March*, 133 Pa. St. 64. As a general rule, a contract for the sale of land must bind both parties, or it will bind neither: *Atlee v. Bartholomew*, 69 Wis. 43; 5 Am. St. Rep. 103; *Glass v. Rose*, 103 Mo. 513. But a unilateral contract, in writing, simply giving an option to purchase land within a specified time for a given price, is binding only upon the party who signs it for the time stipulated for the exercise of the option: *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417; *Calanchini v. Branstetter*, 84 Cal. 249.

SPECIFIC PERFORMANCE, TITLE NECESSARY TO GIVE PLAINTIFF THE RIGHT TO. — An agreement to purchase land with payment of the purchase-money gives an equitable title which a court of chancery will enforce: *Whitbeck v. Whitbeck*, 9 Cow. 266; 18 Am. Dec. 503.

SPECIFIC PERFORMANCE, AGAINST WHOM ENFORCEABLE. — Where the specific performance of an agreement respecting lands will be decreed between the parties, it will be decreed between all parties claiming under them in privity of estate, or representation, or title, unless other controlling equities intervene: *Hays v. Hall*, 4 Port. 374; 30 Am. Dec. 530. Thus specific performance will be decreed against an heir at law on a contract of sale made by his ancestor, though such contract did not purport to be obligatory on the heirs: *Moore v. Fitz Randolph*, 6 Leigh, 175; 29 Am. Dec. 208; *contra*, *Givens v. Calder*, 2 Desaus. Eq. 172; 2 Am. Dec. 686.

OPTION NOT REVOCABLE WITHIN DESIGNATED TIME. — The rule as regards contracts generally is, that "when, on making the offer, the proposer expressly promises to allow a certain time to the other party for acceptance, the offer may, nevertheless, be retracted in the interval, if no consideration has been given for the promise": See note to *Eskridge v. Glover*, 26 Am. Dec. 350. When a consideration has been given, as in the principal case, the option must, *e converso*, be irrevocable for the time during which it was to continue. A verbal agreement or promise to extend the time for the exercise of an option to buy, unsupported by a consideration, is a mere *nudum pactum*, and not enforceable: *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417.

CENTRAL RAILROAD AND BANKING COMPANY v. VAUGHAN.

[93 ALABAMA, 209.]

RAILROAD CORPORATIONS — RECKLESS INJURY OF TRESPASSERS. — IF ONE WHO WALKS UPON A RAILROAD TRACK about midway of a trestle one hundred feet long and fifteen to twenty feet high is seen by the engineer of an approaching train, which could have been stopped by prompt action on the part of such engineer in time to prevent injury to the person on the track, and the engineer speculates upon the chances of the latter's reaching the end of the trestle before the train does, until it is too late to stop the train, and he is run over and killed, the railroad corporation is answerable in damages, because it was recklessness for engineers to speculate upon such chances.

RAILWAY CORPORATIONS — TRESPASSERS, DUTY TO. — AN ENGINEER in charge of a railway train does not owe a duty to trespassers to keep any special lookout for them, or to withdraw his lookout from the track in front of

his engine, to look across the country to a trestle to see whether there is any one thereon. Hence it is error to admit evidence showing that by so looking the trespasser on such trestle could have been seen in time to avoid injury to him.

APPELLATE PRACTICE. — IF ERRONEOUSLY ADMITTED EVIDENCE MIGHT HAVE MISLED the jury, and caused them to hold defendant liable to damages which they might not otherwise have felt authorized to impose, its admission cannot be presumed to have been error without injury.

Roquemore, White, and McKenzie, for the appellant.

J. E. Long and G. L. Comer, for the respondent.

McCLELLAN, J. 1. Plaintiff's intestate was confessedly guilty of negligence, which contributed proximately to his death, in being at the time of the fatal collision on the trestle supporting defendant's track. He was a trespasser to whom the defendant owed no duty, except the exercise of reasonable care and diligence after he was discovered on the track, or after his peril became apparent to its employees, to avoid injuring him: *Tanner v. Louisville etc. R. R. Co.*, 60 Ala. 621; *South and North Alabama R. R. Co. v. Donovan*, 84 Ala. 141; *Memphis etc. R. R. Co. v. Womack*, 84 Ala. 149; *Georgia Pac. R. R. Co. v. Blanton*, 84 Ala. 154; *Bentley v. Georgia Pac. R'y Co.*, 86 Ala. 484; *Louisville etc. R. R. Co. v. Black*, 89 Ala. 313.

To entitle plaintiff to recover notwithstanding her intestate's contributory negligence, it must have been made to appear that defendant's employees, after discovering his peril, failed to exercise due care and diligence to avert the injury. Such failure, with such knowledge of the situation and probable consequences of the omission of preventive effort, when such effort might have been effectual to avoid the accident, is gross negligence, so called, recklessness, or wantonness, implying a willingness to inflict the injury, which is the legal equivalent of willfulness or intentional wrong-doing, against the results of which the mere negligence of the person injured is no defense: *Authorities supra*; *Carrington v. Louisville etc. R. R. Co.*, 88 Ala. 472; *Georgia Pac. R'y Co. v. Lee*, 92 Ala. 262, and authorities therein cited.

2. One aspect of the evidence in this record tended to show that the intestate, at the time he was discovered by the engineer, was on and about midway of a trestle which was one hundred feet long and fifteen or twenty feet high. At this time the train was distant from 350 to 660 yards from the trestle, the testimony of the several witnesses varying within these limits. There was evidence going to show that the train, under existing

conditions, might have been stopped within four hundred or five hundred yards, or even a less distance than four hundred yards, had all appliances to that end been promptly resorted to by the train-men. The evidence also tended to establish that the engineer did not promptly avail himself of the means at hand to stop the train short of the point of the accident after discovering the deceased on the track; but he says he acted for a time upon the assumption that the intestate would reach the end of the trestle and get off the track before the train reached that point, and that he did not discover the peril until the party injured stopped, hesitated, and turned and attempted to retrace his steps, and that then, and not until then, he attempted to stop his train. If Vaughan, the intestate, was midway the trestle, and not within "five or six cross-ties of its western end," as the engineer testifies, his peril was manifest and imminent when he was first seen by the latter, since he could not possibly have gotten off in time to have escaped, in view of the speed at which the train was approaching. The jury had a right to find that such was his position, and that it was apparent to the engineer the moment he saw him. So finding, it was further open to them to reach the conclusion, on those tendencies of the evidence most favorable to the plaintiff, that the catastrophe might have been averted had the engineer at once resorted to all reasonable effort to stop his train. And if this were so, his failure so to do, upon speculations as to the chances of Vaughan reaching the end of the trestle before the train did, was such recklessness as would have justified a verdict for the plaintiff, notwithstanding Vaughan's own negligence. The general charge requested for the defendant would have denied the jury's right to find for plaintiff on these considerations, and it was properly refused: *Cook v. Central R. R. etc. Co.*, 67 Ala. 533.

3, 4. The testimony of the witness Florence, to the effect that "a person on the engine, at a point back of and before entering the curve, a distance of four hundred yards from the trestle, could see a person on the trestle on a straight line from the engine to the trestle," should have been excluded. It is to be noted that the point here referred to was farther from the trestle than that from which the engineer first saw Vaughan, according to all the evidence, and there is no evidence whatever that he did in fact see him from this other point back of the curve. It cannot be said that it was the en-

gineer's duty to withdraw his lookout from the track in front of his engine, and look across the country to the trestle, or indeed that it was his duty to keep any special outlook for trespassers at all. Hence there could be no presumption that he did see from this point from the fact that to have seen was possible. Nor would his failure to look from that point, even had such failure involved an omission of duty (which it would not have done), been more than simple negligence, which could not have availed the plaintiff in this case, such omission not importing either recklessness or wantonness: *Georgia Pac. R'y Co. v. Lee*, 92 Ala. 262. This evidence was therefore wholly irrelevant; it could not have shed light upon any issue in the case. Yet we can see that it might well have misled the jury, either to the conclusion that Vaughan was seen from the point in question, and his peril thus brought to the knowledge of the train-men in time for them to have avoided the accident, or that their failure to see Vaughan through this feasible avenue of vision justified them in holding the defendant liable in damages, which they might not otherwise have felt authorized to impose. At least, we cannot have that assurance that this evidence did not conduce to the result reached by the jury, which would warrant us in holding its admission to have been error without injury. The court's action in receiving it must therefore operate a reversal of the judgment and the remandment of the cause.

Reversed and remanded.

IN THE CASE OF *Louisville etc. R'y Co. v. Trammell*, 93 Ala. 350, it appeared that an employee of the defendant, for causing whose death an action was brought, was in dangerous proximity to the railroad track, and ignorant or oblivious to peril from an approaching train; that he was seen by the engineer of the train in time to avert injury, but that the engineer failed to use the available means at his disposition, though the peril was obvious. In holding the railway liable for the injuries inflicted, because the gross negligence of its engineer was, under the circumstances, equivalent to willful and intentional wrong, the court said: "Under these circumstances, the latter's failure, in the presence of known danger, to use all the means in his power to avoid striking the intestate, it appearing that preventive effort would have been effectual, was such recklessness or wantonness as supports the averments of the complaint as to willfulness and intentional wrong, not to speak of or base our conclusion upon the evidence of an expressed willingness on the part of the engineer to run down upon Trammell. We are therefore satisfied of the correctness of the trial court's view of the facts of the disaster."

RAILROAD COMPANIES — DUTY TO TRESPASSERS ON THE TRACK. — The doctrine announced in the principal case, that an engineer in charge of a railroad train is not bound to keep a lookout for trespassers, is not ac-

cepted universally. That the company is responsible only for willful or wanton injuries, or for injuries resulting from a degree of negligence equivalent thereto, is a principle regarding which there seems to be no disagreement: *Roden v. Chicago etc. R. R. Co.*, 133 Ill. 72; 23 Am. St. Rep. 585; *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 430; *Dillon v. Connecticut River R'y Co.*, 154 Mass. 478; *Spicer v. Chesapeake etc. R. R. Co.*, 34 W. Va. 514. The divergence of view arises when it becomes necessary to determine, in particular instances, whether there has been negligence of that degree which will render the legal responsibility of the company for the injuries caused thereby identical with that which would attach to it if the injuries had been willful or wanton. Thus as regards the duty of keeping a lookout, there is a direct conflict of opinion. In *State v. Baltimore etc. R. R. Co.*, 69 Md. 494, 9 Am. St. Rep. 436, it is declared that the company's servants are under no obligation to keep a lookout for his protection. But the better opinion, we think, and one which is supported by an equal, if not greater, weight of authority, is, that it is the duty of the engineer to keep such a lookout: *Troy v. Cape Fear R. R. Co.*, 99 N. C. 298; 6 Am. St. Rep. 522; *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902. In *East Tennessee etc. R. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149, the rule is stated quite strongly that the company must exercise the utmost care and diligence to avoid running over a person on its track. As a matter of principle, it is certainly not very easy to see why persons walking on the track should not have the benefit of the duty under which the engineer lies to look out for obstructions that will be dangerous to the train itself. The mere fact that a human being is not a dangerous obstruction does not seem to be an altogether satisfactory reason for requiring a different degree of care in the two cases. The true principle, it is conceived, is, that the engineer should see that the track is clear; but that when an obstruction is perceived, the proper course to adopt will depend upon whether it is a living or inanimate object, and if it is a living object, whether it is an intelligent human being, capable, under ordinary circumstances, of discerning the means of securing safety, or a brute, which has no guide but mere instinct. If the object seen is an intelligent human being, it seems to be generally agreed that the engineer has a right to presume that he will get out of harm's way before the engine reaches him, and that it is not negligence to act upon that presumption: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902; *International etc. R'y Co. v. Garcia*, 75 Tex. 583. This is the same rule that prevails when persons are observed at a crossing: *Ohio etc. R'y Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638; *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82; *Heddles v. Chicago etc. R'y Co.*, 77 Wis. 228; 20 Am. St. Rep. 106. It, upon the discovery of the person upon the track, everything that is possible is done to prevent an accident, the company is not liable: *Phillips v. East Tenn. etc. R'y Co.*, 87 Ga. 272. The difficulty is to determine whether that duty has been filled in the particular case under review. It seems certain, however, that the engineer is not allowed to act on the presumption that the person will get out of harm's way a moment after his behavior raises a doubt as to whether he is sensible of the danger or capable of providing for his safety. Thus it has been held that when an engineer discovers, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or sees a human being, known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in front, it is his duty to resolve all doubt in favor of the preservation of life,

and immediately use every available means, short of imperiling the lives of passengers on the train, to stop it: *Deans v. Wilmington etc. R'y Co.*, 107 N. C. 686; 22 Am. St. Rep. 902; *Clark v. Wilmington etc. R'y Co.*, 109 N. C. 430. In the latter case, the plaintiff had placed himself in peril on a trestle, and the court declared that the engineer should, upon discovering him, have acted on the supposition that he might have been drunk or bereft of reason from sudden terror, and used every means consistent with safety to stop the train, and that the rule was the same if the engineer could, by proper watchfulness, have discovered the person's danger in time to avoid it. But there must be something in the external appearance or actions of the person on the track to excite a doubt in the engineer's mind, or he will be entitled to act upon the usual presumption that such person is able and intends to provide for his safety. Thus in the case of a latent incapacity like deafness, the conduct of the railroad company's servants should be considered as though the plaintiff was in the full possession of his faculties, and their care estimated from that stand-point. A greater degree of care is incumbent upon a deaf man in walking upon or crossing a railroad track than upon one having his senses perfect: *International etc. R'y Co. v. Garcia*, 75 Tex. 583.

MOSS v. DECATUR LAND IMPROVEMENT AND FURNACE COMPANY.

[93 ALABAMA, 209.]

EMPLOYER AND EMPLOYEE — MONTHLY HIRING. — If one is employed to be paid by the month a designated price, this constitutes an entire contract by the month, which the employer cannot terminate at will, and under which he is liable for a month's wages if he discharges his employee without cause before the expiration of the month.

Wert and Speake, for the appellant.

Brickell, Harris, and Eyster, contra.

COLEMAN, J. When there is no conflict in the evidence, it is the duty of the court to declare the conclusion of the law. The court charged the jury, if they believed the evidence, to find for the defendant. It appears from the bill of exceptions that, in the month of February, plaintiff was employed as book-keeper for defendant, at the price of fifty dollars per month; and that he went to work, beginning on the sixth day of February, and worked the balance of the month at that rate, and was paid at the end of the month at the rate of fifty dollars per month; that nothing more was said, and he worked through March and April, receiving at the end of each month fifty dollars. On the 1st of May, it was agreed that defendant should pay plaintiff sixty dollars per month, which amount was paid him at the end of the month. "That noth-

ing was said about a hiring by the day, or week, or year, but that he was employed and was to be paid by the month at sixty dollars per month, for no special time." Without any further understanding, plaintiff continued his services until he was discharged on the fourteenth day of June. There was no reason assigned for discharging plaintiff, except a desire to lessen expenses, and plaintiff offered to continue his services. Defendant tendered to plaintiff twenty-eight dollars for the fourteen days of service rendered in June, being the amount then owing at the rate of sixty dollars per month; which sum plaintiff refused to receive in satisfaction, but claimed that defendant was indebted to him for the entire month of June. The suit was brought to recover the amount of sixty dollars, claimed to be due under the agreement for the month of June.

The question is, Do these facts constitute an entire contract of hiring by the month, or a contract terminating at will, entitling the party to be paid only at the rate of sixty dollars per month? Whatever may have been the effect of the contract made in February, the evidence is, that, in May, "plaintiff was employed and was to be paid by the month, at sixty dollars per month." This was not a hiring by the day, at the rate of sixty dollars per month. In the case of *Beach v. Mullin*, 34 N. J. L. 344, it was held "that a contract to pay sixteen dollars for a month's service is as entire in its consideration as is a contract to pay a sum for a chattel. If the payment of monthly or weekly wages is the only circumstance from which the duration of the contract is to be inferred, it will be taken to be a hiring for a month or a week": *Beach v. Mullin*, 34 N. J. L. 344; *King v. Inhabitants of Mitcham*, 12 East, 351. If plaintiff had voluntarily left the employment of defendant, without legal excuse, on the fourteenth day of June, under the evidence in this case he could not have recovered for services rendered up to the time of quitting. A contract of this character, to be valid, must be mutually binding.

The contract proven in this case is altogether different from the contract proven in the case of *Howard v. East Tennessee etc. R. R. Co.*, 91 Ala. 268, at present term. In the latter case, there was nothing to show a monthly hiring for a longer term than by the month, and there was no averment in the complaint to show that the plaintiff was discharged at any other time than at the end of the month.

Under the view we take of the contract, it becomes unnecessary to consider other questions raised upon the admissibility

of evidence offered by plaintiff, and which was excluded by the court.

The court erred in giving the general charge in favor of defendant.

Reversed and remanded.

MASTER AND SERVANT. — A hiring for one year, with monthly payments of wages, is an entire contract: *Larkin v. Hecksher*, 51 N. J. L. 133. If one is hired to do service in any business, the presumption is, in the absence of an agreement to the contrary, or circumstances showing a contrary intention, that the service was to continue for a year; and while an agreement upon weekly or monthly payment of wages may be sufficient of itself to create a presumption of hiring for the corresponding periods, still, other circumstances may show that the service was to continue for a year, although the payment of wages was to continue monthly: *Smith v. Theobald*, 86 Ky. 141.

MASTER AND SERVANT — AMOUNT OF RECOVERY FOR SERVICES. — A master discharging his servant before the end of the year, where the hiring is by the year, is liable for wages for the full time: *Ferreira v. Sayres*, 5 Watts & S. 210; 40 Am. Dec. 496; *Decamp v. Hewitt*, 11 Rob. (La.) 290; 43 Am. Dec. 204; *Webster v. Wade*, 19 Cal. 291; 79 Am. Dec. 218; *Markham v. Markham*, 110 N. C. 356. In such case it will not be presumed that other employment might have been found during the unexpired term: *Costigan v. Mahant etc. R. R. Co.*, 2 Denio, 609; 43 Am. Dec. 758. But although thus entitled to full wages for the unexpired part of the term, the employer may reduce the amount by so much as the servant did earn, or could by the use of ordinary diligence have earned; the burden of showing that employment might have been procured by a reasonable effort is upon the defendant: *Murray v. Steckel*, 126 Pa. St. 171; 12 Am. St. Rep. 857; *Cox v. Bearden*, 84 Ga. 304; 20 Am. St. Rep. 359; *King v. Steiren*, 44 Pa. St. 99; 84 Am. Dec. 419; *Strauss v. Meertief*, 64 Ala. 299; 38 Am. Rep. 8; *Hunt v. Crane*, 33 Miss. 600; 69 Am. Dec. 381.

SEAY v. PALMER.

[98 ALABAMA, 381.]

CONFLICT OF LAWS. — AS TO SUCH PORTIONS OF A CONTRACT AS PERTAIN TO AND AFFECT THE REMEDY, the principle is applicable, that all matters pertaining to the remedy, and to the proper course of enforcing the contract, are determinable by the law of the place where suit is brought.

EXECUTION — EXEMPTIONS. — A CONTRACT TO WAIVE ALL RIGHTS OF EXEMPTION FROM EXECUTION applies only to the exemption laws of the state wherein the contract was made, and does not deprive the debtor of the benefit of the exemption laws of another state in which he is sued.

Brothers, Willett, and Willett, for the appellant.

McLeod and Tunstall, for the respondent.

CLOPTON, J. The waiver of exemptions as to personalty is averred in the complaint, which counts on a note. The court,

to whom the case was submitted without a jury, gave judgment in favor of plaintiff for the amount due on the note, but refused to declare in the judgment the fact of waiver and its extent, under section 2570 of the code. The waiver is included in the note; its language is: "And all rights of exemption and homestead are hereby expressly waived by the makers, sureties, and indorsers of this note." The refusal of the court to declare the waiver in the judgment is based on the undisputed fact that the note was made, and the parties resided at the time, in the state of Georgia. The question therefore is, whether, in a suit on the note, the courts of this state will enforce such a waiver of the right to exemptions.

No statute of Georgia in reference to exemptions having been put in evidence, ordinarily the presumption would be, that the common law prevails, which allows the debtor no exemptions of property from sale under execution. But as the rigorous rule of the common law is now the exception, and indulging the presumption in favor of the validity of the agreement of waiver arising from its inclusion in the note, we shall assume that exemptions are allowed and waiver thereof authorized by the laws of Georgia. Inspection of the statutes is material only as they may aid in the proper construction of the waiver.

A waiver of exemptions made at the time the debt is contracted has been held to form a part of the original contract; supported by the same consideration on which rests the liability to pay, and hence must be construed and have operation and effect as other contracts: *Neely v. Henry*, 63 Ala. 261. The well-settled principle of interstate comity, that the validity, interpretation, and obligatory force of contracts depend on the law of the place where made, being also the place of performance, and will be accordingly enforced by the courts of other states, if not repugnant to its laws and policy, applies to such parts of the contract as are of the essence of the personal liability and obligation, which determine and regulate the rights of the parties. But as to such portions of the contract as pertain to and affect the remedy, the principle is applicable, that all matters pertaining to the remedy, and the proper course of enforcing the contract, are determinable by the law of the place where the suit is brought; for the courts will not enforce such part of a contract as limits, modifies, or enlarges the remedy, any more than they will enforce the remedial statutes of another state. Whether the waiver comes

within one or the other of these principles depends upon its nature. Laws exempting a portion of a debtor's property from levy and sale under execution are generally regarded as limitations upon the remedy, — remedial statutes, which have no extraterritorial operation, — and an agreement to waive the right of exemption operates to remove the limitation, and subject all the debtor's property to levy and sale under execution or other process, as at common law. The part of the contract waiving all rights of exemption affects only the remedy. Therefore, if the waiver included in the note sued on was not intended to have reference to the exemption laws of this state, comity would not require its enforcement. If it was so intended, then its enforcement would depend on the principles which govern where a contract made in one state is to be performed in another.

This brings for consideration the construction of the waiver, which constitutes the real contestation between the parties. Appellant contends that the waiver had reference to and embraces exemptions to which defendant might subsequently become entitled by removal to and residence in another state. Appellee contends that it should be construed as having reference only to the exemptions allowed by the laws of Georgia, where the note was made and the parties resided. In *Holland v. Bergan*, 89 Ala. 622, it was contended that the waiver in the note, which was made in Georgia, was valid against any claim of exemption, in a suit thereon in this state. The question was not decided, but it was observed, in the opinion rendered: "If we felt authorized to decide this point, we are inclined to the view that the waiver would be good against any claim of exemption to personalty in any state of the Union, where the debtor might reside and be sued." On this expression in the opinion, appellant relies in support of the contestation on his part. The terms and comprehensiveness of the waiver in that case are different from that involved in the present suit. It extended to all exemptions allowed "by the laws, state or federal," and to all the property which the debtor then owned, or might thereafter own or acquire, until the debt was fully paid. Besides, though the note was made in Georgia, the maker resided in Alabama. The fair inference was, that the waiver had reference to the exemptions to which the maker of the note was entitled by the laws of the place of his residence, and where he would probably be sued. Parties are presumed to contract in refer-

to whom the case was submitted without a jury, gave judgment in favor of plaintiff for the amount due on the note, but refused to declare in the judgment the fact of waiver and its extent, under section 2570 of the code. The waiver is included in the note; its language is: "And all rights of exemption and homestead are hereby expressly waived by the makers, sureties, and indorsers of this note." The refusal of the court to declare the waiver in the judgment is based on the undisputed fact that the note was made, and the parties resided at the time, in the state of Georgia. The question therefore is, whether, in a suit on the note, the courts of this state will enforce such a waiver of the right to exemptions.

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within one or the other of these principles depends upon its nature. Laws exempting a portion of a debtor's property from levy and sale under execution are generally regarded as limitations upon the remedy,—remedial statutes, which have no extraterritorial operation,—and an agreement to waive the right of exemption operates to remove the limitation, and subject all the debtor's property to levy and sale under execution or other process, as at common law. The part of the contract waiving all rights of exemption affects only the remedy. Therefore, if the waiver included in the note sued on was not intended to have reference to the exemption laws of this state, comity would not require its enforcement. If it was so intended, then its enforcement would depend on the principles which govern where a contract made in one state is to be performed in another.

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ence to the laws of the country where the contract is made and is to be performed. Intention to contract in reference to the laws of any other state or country must be expressed or clearly implied; else the presumption will prevail. The terms in the waiver included in the note sued on may be comprehensive enough to embrace not only the property then owned by defendant, but also subsequently acquired property, — as broad as the right of exemptions. The terms are: "And all rights of exemption and homestead are hereby expressly waived." There is, however, nothing in these terms indicating a reference to the exemption laws of any state other than Georgia; nothing indicating an intention to exercise the right of waiver authorized by the statutes of this state, which applies only to the right to an exemption in property exempt by the laws from levy and sale under execution or other process. The waiver refers to present and existing rights. Defendant, not being a resident of Alabama at the time it was made, was not entitled to any exemptions under the laws of this state. To construe it as embracing possible prospective rights to exemption which had at the time no potential existence — a mere possibility or expectancy not coupled with any right *in esse* — would be an unwarranted extension of the express terms of the waiver. Considering its language, the place of the contract, residence of the parties, and the laws in reference to which they are presumed to have contracted, it reasonably appears that within the meaning and intention of the parties the waiver had reference only to rights of exemption under the laws of Georgia.

Affirmed.

CONFLICT OF LAWS. — *LEX LOCI* governs validity, interpretation, and construction of contracts, as a general rule. In respect to the time, mode, and extent of the remedy, the *lex fori* prevails: *Woodward v. Brooks*, 128 Ill. 222; 15 Am. St. Rep. 104, and note, where references to other cases and notes in the series are given.

EXECUTION — EXEMPTIONS. — Exemption laws have no extraterritorial effect: *Carson v. Railway Co.*, 88 Tenn. 646; 17 Am. St. Rep. 921. Nor can the exemption laws of one state avail a debtor in a suit instituted against him in another state: *East Tenn. R. R. Co. v. Kennedy*, 83 Ala. 462; 3 Am. St. Rep. 755. See also notes to *Missouri Pac. R'y Co. v. Sharrett*, 19 Am. St. Rep. 145-149, and *Harwell v. Sharp*, 21 Am. St. Rep. 152.

HURD v. LACY.

[93 ALABAMA, 427.]

LAND-OWNER IS LIABLE FOR INJURIES TO STOCK RUNNING AT LARGE, OCCASIONED BY ERECTIONS OR EXCAVATIONS so made on his land as to be obviously dangerous to animals straying thereon, where the right of animals to run at large is recognized by law.

OWNER OF LAND IS LIABLE FOR INJURIES TO ANIMALS CAUSED BY A BARBED-WIRE FENCE not constructed as an ordinarily prudent husbandman constructs such fences, if the right of such animals to run at large is recognized by law, and they stray upon such land and come into contact with such fence.

Brickell, Harris, and Eyster, for the appellant.

Wert and Speake, for the respondent.

WALKER, J. Appellant had a vacant lot on the corner of Church and Sycamore streets, in the town of Decatur. There were no fences on the side of the lot next to the two streets. To keep persons from passing across the lot, the appellant had a barbed wire stretched along its side next to one of the streets, a distance of 132 feet. The wire was supported by five posts thirty or forty feet apart, and was about four feet from the ground at the posts. It was stretched by hand only, and sagged between the posts from eight to twelve inches. There was nothing but the posts and the single wire to warn stock, or to prevent them from running against the wire. There was some growth on the lot, upon which stock would browse. The appellee's mule, while running at large, came in contact with said barbed wire, and thereby received injuries which totally disabled it. The case was tried without a jury, and the city court found as a fact that said wire fence was not constructed as ordinarily prudent husbandmen usually construct such fences, but was erected negligently, carelessly, and dangerously, and without proper regard for the rights of the plaintiff or of the public.

In considering the question of the appellant's liability on the facts of this case, regard is to be had to the state of our law as to the right of owners of domestic animals to suffer them to run at large. In view of the statutes and of the former decisions of this court, no discussion of this subject is called for in the present case. It is well settled that when such animals go upon lands not inclosed by a lawful fence as defined by the statute, the owner thereof cannot be regarded as a trespasser; that the owner of cattle and stock has the

right to permit them to run at large; and that in exercising this right he cannot be treated as guilty of contributory negligence in reference to any injury they may suffer in consequence of the fault of the proprietor of the uninclosed premises upon which they may stray or intrude: Code 1886, secs. 1364, 1365; *Alabama Great Southern R. R. Co. v. Jones*, 71 Ala. 487; *Pruitt v. Elkington*, 59 Ala. 454; *Lee County v. Yarbrough*, 85 Ala. 590; *Rowe v. Baber*, 93 Ala. 422. The common-law rule that the owner of domestic animals must keep them in his own inclosure, and cannot, without becoming a trespasser, suffer them to run at large on the uninclosed lands of others, is completely reversed in this state; so that the general rule here is to fence stock out, not in, the law specially protecting the right of the owner thereof to suffer them to run at large.

Where no right to suffer domestic animals to run at large is recognized, it legitimately follows that the owner thereof, being chargeable with knowledge of the natural propensity of such animals to stray upon any lands to which access is not cut off, in failing to keep them confined, should be treated as assuming the risks to which they may be exposed in their wanderings, and should be answerable for such damages as may naturally be expected to result from the intrusion of such animals upon the premises of others. Where, on the other hand, the right to suffer such animals to run at large is recognized, it would seem as legitimately to follow that the owner of land not properly inclosed is without remedy for injury caused to his premises by stock running at large, and is also to be held to expose himself to liability for damages to such stock occasioned by erections or excavations so made on the land as to be obviously dangerous to animals straying thereon. Good reason for distinguishing the respective duties and liabilities of the land-owner, according as he is subject to the one or the other of the above-mentioned rules of law as to confining or not confining domestic animals, is to be found in the consideration that the results of applying the maxim, that you must so use your property as not to injure the property of another, necessarily depend upon the state of the law as to the correlative rights of the land-owner and of those who may be affected by his use of his property. There is a striking contrast between the positions of two proprietors, one of whom has the right to leave his land uninclosed, and yet to treat the invasion of his premises by domestic animals as trespasses, and the other of whom must securely inclose his premises in

order to acquire any right to complain of domestic animals straying thereon. Such differences as to what is required to confer upon the land-owner the right to an exclusive enjoyment of his property, free from annoyance by straying stock, must, of necessity, lead to corresponding differences in the rules to be applied in determining the liability of the land-owner for injuries to stock straying upon his premises. The liability must, to some extent, depend upon the question as to whether the law regards such intrusion as rightful or wrongful. Upon this subject the rule prevailing here is very different from the old common-law rule. The result is to work a corresponding change in the liability of the land-owner. It follows, therefore, that where the general law of this state prevails, a person's right to the use of his land is, in a measure, affected by the recognized right of others to allow their stock to run at large. This latter right would be practically destroyed if upon the lands not inclosed by a lawful fence erections or excavations could with impunity be so made that animals straying thereon would be exposed to injury or destruction. It seems plain, under our law, that the land-owner has no right to expose straying stock to such perils. He may be under no duty to guard them from the dangers to which they may be exposed in consequence of the natural features of the land, such as ditches, holes, decayed trees liable to fall, etc. Nor would he be liable for an injury to an animal caused by a fence built in the usual way. If, however, a fence or other erection is so negligently maintained on the land as to be in effect a trap to passing animals; if the injury to animals is the natural or probable consequence of the act, and such as any prudent man must have foreseen,—then, in the event of such injury, the land-owner is liable in damages therefor: *Sisk v. Crump*, 112 Ind. 504; 2 Am. St. Rep. 213, and authorities there cited.

The evidence in this case fully sustained the finding of the city court as to the defendant's negligence. A single barbed wire four feet from the ground, and loosely hung from posts thirty or forty feet apart, was certainly not calculated to attract the notice of animals so as to prevent them from trying to pass to or from the lot, which was otherwise uninclosed. It could not be pretended that such an erection was a barbed-wire fence constructed and maintained as ordinarily prudent husbandmen usually construct fences. There was no proof of any local law or municipal regulation abridging the right of

the owner of domestic animals to suffer them to run at large. The defendant, being chargeable with knowledge of this right in others, and also with knowledge of the habits of such animals to stray and browse upon uninclosed land, is to be regarded as guilty of negligence in permitting the wire to remain in such a condition as to be an obvious peril to animals straying upon the lot. And the injury complained of having resulted from such negligence, the defendant was liable therefor.

The conclusion of fact stated in defendant's second plea, to the effect that contributory negligence on the part of the plaintiff was deducible from his acts in allowing his mule to run at large, and to trespass upon defendant's property, was not supported by the evidence; because, in the circumstances developed by the proof, those acts did not constitute negligence, as they might have done under the influence of a local law or municipal regulation rendering inapplicable the general law of the state on the subject. No error is discovered in the rulings of the city court.

Affirmed.

NEGLIGENCE — LIABILITY OF LAND-OWNER FOR INJURY TO STOCK. — Where a land-owner dug a pit under a cotton-gin, near a highway, and left it uninclosed, with corn and cotton-seed scattered about it, and the plaintiff's cow, which was turned out to commons remote from the gin, fell into it, and was killed, he was held liable: *Jones v. Nichols*, 46 Ark. 207; 55 Am. Rep. 575. In a county where stock was allowed to run at large, the defendant dug a well on his uninclosed land, near the highway, which was left unfenced and uncovered, and plaintiff's horse, running at large, fell into it, and plaintiff was held entitled to recover damages: *Haughey v. Hart*, 62 Iowa, 96; 49 Am. Rep. 128.

LIABILITY OF LAND-OWNER FOR MAINTAINING BARBED-WIRE FENCE ON LAND: See note to *McIntire v. Roberts*, 14 Am. St. Rep. 436. One who negligently constructs and knowingly maintains a barbed-wire fence in dangerous condition between his land and the adjacent highway is liable for an injury thereby occasioned to domestic animals lawfully running at large: *Sisk v. Crump*, 112 Ind. 504; 2 Am. St. Rep. 213, and note; see *Loveland v. Gardner*, 79 Cal. 317.

ALABAMA GREAT SOUTHERN R. R. Co. v. HILL.

[98 ALABAMA, 514.]

IN MAKING AN ORDER FOR THE PHYSICAL EXAMINATION OF A LITIGANT suing to recover for personal injuries, and in designating the expert to execute it, the court exercises a discretion which neither party has any right to control, and neither is entitled to suggest an expert and insist upon his selection by the court.

PRACTICE — A MOTION TO POSTPONE A TRIAL TO A LATER DAY OF THE TERM is addressed to the unreviewable discretion of the trial court.

APPEALS — STATUTE, WHETHER RETROACTIVE. — A statute creating a right of appeal from the decision of a court in granting or denying motions for new trials is not applicable to cases tried before its enactment.

EVIDENCE — IN AN ACTION TO RECOVER FOR PERSONAL INJURIES, in which the fact and extent of the injuries suffered by plaintiff are in issue, it is proper to admit evidence that plaintiff always had good health up to the time of the alleged injury, that her physical organs had performed their functions naturally and regularly, that afterwards she suffered great pain, could not sleep without opiates, nor walk any distance, and that her physical organs acted irregularly.

EVIDENCE — EXPERTS. — If a physician testifying as an expert with reference to plaintiff's physical condition stated that much of her pain was caused by the condition of the coccyx-bone, and that this condition could be cured by a surgical operation to which he did not deem himself equal, it is not error to overrule a question calling for the reasons which actuated his omission to call in a surgeon to remove such bone.

DAMAGES — IMPAIRMENT OF PHYSICAL FUNCTIONS. — The fact that plaintiff's injuries were of such a character as to render child-bearing perilous to her life is admissible in an action for compensation for personal injuries, though she is not and may never be married. It is to be assumed that every physical function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each of them.

RAILROAD CORPORATION — ACCIDENT. — In an action for personal injuries suffered through the derailment of a train of cars in which plaintiff was a passenger, evidence is admissible which tends to prove that rails and cross-ties in the neighborhood, as well as those where the accident occurred, were old, rotten, and decayed. Such evidence is competent, both because the defective ties and rails may have imparted an irregular motion to the cars and contributed to the accident, and because it supports an inference that defendant's employees knew of the perilous condition of the track, including the portion consisting of the broken rail and the ties beneath it where the derailment took place.

RAILROAD CORPORATIONS — ACCIDENT — EVIDENCE. — The testimony of a witness, that to the best of his judgment the rail broken was on a rotten cross-tie, but that he would not be positive, is admissible, because it is merely a statement of a fact according to the best of his recollection.

CARRIERS OF PASSENGERS — STRICT DILIGENCE. — An instruction that the law requires strict diligence of carriers of passengers is not unjust to the carrier; for the law imposes upon carriers the duty of exercising the highest care, skill, and diligence in the transportation of passengers, and

holds them responsible for the consequence of the slightest negligence resulting in injury to the persons sustaining that relation to them.

NEGLIGENCE, PRESUMPTION OF. — IF A PASSENGER RECEIVES INJURIES FROM THE DERAILMENT of a railway car, the presumption is that such derailment resulted from the negligence of the carrier. This presumption can be rebutted only by satisfying the jury that the derailment was not due to any negligence, and could not have been prevented by the exercise of the highest degree of care, skill, and diligence on the part of the carrier.

JURY TRIAL — INSTRUCTIONS SHOULD BE CONSIDERED AS A WHOLE. — The general charge given in a trial court should be read and construed with regard to the connection between its several sentences and provisions, and if any part, when so considered, limited, or expanded, asserts the law correctly, it will not furnish ground for reversal, however faulty a particular clause may be, if its meaning were not controlled by a prior or subsequent passage.

EVIDENCE OF EXPERTS, EFFECT TO BE GIVEN. — If a jury reach a given conclusion from a consideration of the whole evidence, including as well the opinion of experts as substantive facts deposed to by witnesses, whether experts or not, they are not to surrender this conclusion because the opinions of experts do not coincide with theirs. In other words, the jury need not substitute for their own views of what is established by the whole evidence the conclusion stated by the experts.

JURY TRIAL. — IMPROPER REMARKS OF COUNSEL cannot be complained of, if they were necessitated by like remarks of his adversary.

DAMAGES. — EXEMPLARY DAMAGES may be awarded to one receiving personal injuries while a passenger on a railway car from its derailment, if the condition of the rails and cross-ties and the fact that old rails were being used constantly to repair the old track satisfy the jury that the rails used in the track were old and the cross-ties decayed and rotten, and that the defendant knew of their condition and was guilty of recklessness and wantonness in continuing to run trains over a track in so dangerous a condition.

NEGLIGENCE. — EXEMPLARY DAMAGES may be imposed, though there is not an entire want of care in the maintenance of a railway track upon which a passenger train is derailed, if, notwithstanding the exercise of some care, the track is consciously left in such a condition that to run trains over it would probably result in the disaster which occurred.

JURY TRIAL — INSTRUCTIONS. — A trial court is under no obligation to single out the testimony of one or more witnesses and instruct the jury to reach certain conclusions if such testimony be believed.

JURY TRIAL. — INSTRUCTION THAT IF THE JURY WERE IN DOUBT AND UNCERTAINTY as to certain facts essential to the plaintiff's case they should find against him may be refused without committing error. The mind may be reasonably satisfied of a given fact, and yet not certain of it nor free of doubt in respect to it.

Edward Colston, H. M. Somerville, Wood and Wood, and John M. Martin, for the appellant.

Taliaferro and Smithson, for the respondent.

McCLELLAN, J. It was determined on the former appeal in this cause (90 Ala. 71; 24 Am. St. Rep. 764) that the defend-

ant was entitled to have a physical examination of the plaintiff's person made by disinterested and competent experts to be appointed by the court. The selection of such experts is a matter entirely within the discretion of the trial judge. Neither party has any right, by suggestion, motion, or otherwise, to control his discretion in any degree. The court, in making the order for a physical examination, and in designating the experts to execute it, is conserving the interest of neither the defendant nor the plaintiff, but the ends of justice; and when a competent and impartial commission is named, it is a matter of no consequence whatever that the parties, or either of them, preferred and demanded the appointment of other persons. There is no suggestion here that the physicians selected were not in all respects qualified to discharge the duty imposed upon them by the order of the court; and the court's declination to appoint Dr. Batty at the instance of the defendant is not a matter which this court will review. Moreover, were this action revisable, we are by no means prepared to say that the fact that Dr. Batty had already formed and expressed an opinion relative to the existence of the injuries laid in the complaint was not ample justification for the court's refusal to appoint him on the commission.

2. Motions to postpone a trial to a later day of the term stand upon the same footing as applications for continuances from term to term, and both are addressed to the unrevisable discretion of the court: *De Arman v. State*, 77 Ala. 10; *Walker v. State*, 91 Ala. 76; 2 Brickell's Digest, 404, 405.

3. This cause was tried in October, 1890, before the passage of the act allowing appeals to this court from "decisions of the city and circuit courts in this state granting or refusing to grant motions for new trials": Acts 1890-91, p. 779; and the action of the city court, in denial of the application for a new trial made by the defendant, cannot be reviewed: *Tramwell v. Vane*, 62 Ala. 301; *Tyree v. Parham*, 66 Ala. 424; *Bedwell v. Bedwell*, 77 Ala. 587; *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764.

4. Damages are claimed in this action for that the plaintiff, a passenger on defendant's train, received from the derailment of the car in which she was being transported injuries which produced present and continuing pain and mental anxiety, immediate physical hurts, which are permanent in their character, and are alleged to have seriously impaired her health and threatened her life. Whether she was injured at

all was a point of much controversy in the case. Similarly, each detail and specification of injury was made the subject of severe contestation on the trial. Whether the injuries, if any, were painful, and in what degree; whether she was shocked and prostrated; whether she was subsequently in bad health as a resultant of the injuries she received; whether, and to what extent, her physical condition after the accident was abnormally bad, — were, with other like injuries, injected into the case by the pleadings, and prosecuted before the jury. We cannot for a moment be in doubt that, as pertinent to these issues, it was entirely competent for the plaintiff to prove that she had always enjoyed good health before and up to the time of the derailment; that her physical organs had theretofore discharged their functions naturally and regularly; the manner in which she was jolted, tossed, and thrown about, as the car ran for some distance on the cross-ties, and finally turned over an embankment; that immediately afterwards she “could hardly get up,” and was “suffering great pain”; that afterwards she “could never sleep unless she had some medicine to quiet her”; that she “had not undertaken since the accident to walk any great distance, and could not walk any great distance”; that “her menstruations had been irregular ever since she was hurt,” etc. All this evidence was, in our opinion, clearly admissible, as tending to show the fact and extent and character of the injuries which she had sustained: *Bay Shore R. R. Co. v. Harris*, 67 Ala. 6; *East Tennessee etc. R. R. Co. v. Lockhart*, 79 Ala. 315; *South and North Alabama R. R. Co. v. McLendon*, 63 Ala. 266; 2 Thompson on Negligence, 1256, 1257.

5. The reasons which actuated Dr. Drennen to his omission “to call in some surgeon and remove” the coccyx-bone could not, of course, have any bearing upon plaintiff’s right of recovery, nor tend to lessen or increase her damages. Nor do we conceive that such reasons could have affected the credibility or value of his testimony as an expert. He testified that the condition of this bone was the cause of much pain to the plaintiff, and that this condition could be cured by its removal by a surgical operation to which he did not deem himself equal. Add to these facts the concession of what is assumed in the question, that he did not call in a surgeon, etc., and it would seem that, standing alone, they involve a greater tendency to impeach his competency as an expert than any explanation of his failure to take steps for the operation

would have done. We cannot assume that the reasons called for by the question would have been of such character as to impugn the intelligence and personal attainments of the witness. Moreover, we know of no basis for a distinction between witnesses of this and other classes, which would take these, when speaking to matters of this kind, out of the general rule against drawing out the reasons which conduced to an act or omission to which they depose: *Herring v. Skaggs*, 62 Ala. 180; 34 Am. Rep. 4.

6. The objection to the testimony of Dr. Drennen, to the effect that plaintiff's injuries were of such character as that child-bearing would be thereby rendered perilous to life, is untenable. It may be that she might never have married, even had she not been injured; or that, marrying, she might have had no desire to bear children; or even that, desiring issue, she might not have had any, as is argued by counsel; but these considerations can exert no influence on the question. It is to be assumed that every physical endowment, function, and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them. And to that extent to which any function is destroyed, or its discharge rendered painful or perilous, by the wrongful infliction of personal injury, is the party complaining entitled to damages. We can, in other words, conceive of no physical injury wrongfully inflicted, whether entailing pain only, or disfigurement, or incapacity, relative or absolute, to perform any of the functions of life, which may not be made the predicate for compensation in damages: *Mayor etc. of Birmingham v. Lewis*, 92 Ala. 352.

7. The evidence tended to show that the immediate cause of the derailment, from which the injury complained of resulted, was the breaking of a rail as the coach in which plaintiff was riding passed over it, and also that the rail gave way in consequence, in part, of the defective condition of the cross-ties under it, and, in part, of the rail itself being old and worn. Plaintiff was allowed, against defendant's objection, to adduce evidence going to show that other rails and cross-ties along there were also old, worn, rotten, decayed, etc. There was no error in this. It may well have been that other defective rails and cross-ties in the immediate vicinity contributed to the breaking of the particular rail, by imparting an irregular motion to the cars, and causing them to bear down with greater weight and force at the point where the track

gave way. Moreover, all this evidence was competent, as affording a stronger inference that defendant's employees knew of the perilous condition of the track, including that portion constituted of the broken rail and the ties beneath it, than would have been afforded by proof confined to the particular rail and ties: *Nashville etc. R. R. Co. v. Johnson*, 15 Lea, 677.

8. The testimony of the witness Curley, that "to the best of my judgment, what we called in the 'short quarter,' where the rail was broken out, was on a rotten cross-tie, but I won't be positive," was but the statement of his best recollection about a fact—that the rail broke on a rotten tie—as to which he would not speak positively, and was properly received: *Head v. Shaver*, 9 Ala. 791; *Wright v. Bolling*, 27 Ala. 259; *Elliott v. Dyche*, 80 Ala. 376.

9. The action of the court in disallowing the question propounded by the defendant to its witness Dr. Gaston, "You have had many cases of obstetrics, have you?" may be justified upon the leading character of the question.

10. The law imposes upon common carriers the duty of exercising the highest degree of care, skill, and diligence in the transportation of passengers, and holds them responsible for the consequences of the slightest negligence resulting in injury to persons sustaining that relation to them. The first paragraph of the general charge to which exception was taken, which implies that the law requires "strict diligence" of such carriers, is well within the principle: *Searle's Adm'r v. Kanawha etc. R'y Co.*, 32 W. Va. 370; *Louisville etc. R'y Co. v. Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60; notes to *Frelsen v. Southern Pac. R'y Co.*, 42 La. Ann. 673; 44 Am. & Eng. R. R. Cas. 319; *Louisville etc. R. R. Co. v. Ritter*, 85 Ky. 368; *New York etc. R'y Co. v. Daugherty*, 6 Am. & Eng. R. R. Cas. 139; *P. R. R. Co. v. Anderson*, 6 Am. & Eng. R. R. Cas. 407; *Bedford etc. R. R. Co. v. Rainbolt*, 99 Ind. 551; *Topeka City R'y Co. v. Higgs*, 38 Kan. 374; 5 Am. St. Rep. 754; *Smith v. St. Paul City R'y Co.*, 32 Minn 1; 50 Am Rep. 550; *Dodge v. Boston etc. S. S. Co.*, 148 Mass. 207; 12 Am. St. Rep. 541; *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175; Hutchinson on Carriers, secs. 503, 799–801; Thompson on Carriers of Passengers, 175 et seq.; 2 Am. & Eng. Ency. of Law, 745; 2 Wood on Railroads, 1095; *Louisville etc. R. R. Co. v. Jones*, 83 Ala. 376; *Georgia Pac. R'y Co. v. Love*, 91

Ala. 432; 24 Am. St. Rep. 927; *Montgomery etc. R'y Co. v. Mallett*, 92 Ala. 209.

This high degree of care is imposed by the law as being reasonable, in view of the relation existing between the carrier and his passenger; and it is in this sense that the term "reasonable care" must be taken to have been employed in *Smith v. Georgia Pac. R'y Co.*, 88 Ala. 540; 16 Am. St. Rep. 63.

11. In *Mallett's* case, *supra*, we had occasion, immediately following the proposition just stated, and after citing the authorities there referred to, to announce the doctrine, that under certain circumstances a presumption of negligence on the part of the carrier arises from proof of an accident and consequent injury to a passenger. We there said: "The authorities present equal unanimity to the proposition that where a passenger receives injuries from the breaking down of the carrier's vehicle, from the derailment of a car, from collisions, and the like occurrences, which would not ordinarily take place but for some negligence on the part of the carrier, the *prima facie* presumption is, that the injury is the result of the carrier's negligence; and in an action therefor, the plaintiff having shown that he was a passenger, and that he was injured by the derailment, for instance, of the car in which he was being transported, he is, upon this, and without more, entitled to recover the damages thereby sustained, unless the defendant, in rebuttal of this *prima facie* presumption, reasonably satisfies the jury that the derailment was not due to any negligence, and could not have been prevented by the exercise of the highest degree of care, skill, and diligence on the part of the carrier": Authorities *supra*; Thompson on Carriers of Passengers, 181 et seq.; 2 Wood on Railroads, 1096; 2 Am. & Eng. Ency. of Law, 768 et seq.; *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384; *Central R. R. Co. v. Sanders*, 73 Ga. 513; *Hipsley v. Kansas City etc. R'y Co.*, 88 Mo. 348; 27 Am. & Eng. R. R. Cas. 287, and note; *Baltimore etc. Tp. Road Co. v. Leonhardt*, 66 Md. 70; 59 Am. Rep. 156; *Eureka Springs R'y Co. v. Timmons*, 51 Ark. 459; 40 Am. & Eng. R. R. Cas. 998, and note; *Stokes v. Saltonstall*, 13 Pet. 181; *Railroad Co. v. Pollard*, 22 Wall. 341; *Louisville etc. R. R. Co. v. Jones*, 83 Ala. 376; *Georgia Pac. R'y Co. v. Love*, 91 Ala. 432; 24 Am. St. Rep. 927. The cases of *Georgia Pac. R'y Co. v. Hughes*, 87 Ala. 610, and *Louisville etc. R. R. Co. v. Reese*, 85 Ala. 497, 7 Am. St. Rep. 66, to which our attention has been invited in this connection, are not in

point. The parties injured, and who were plaintiffs in those actions, were not passengers of the defendant companies; and the principles we have been considering had no application in either of them: *Metropolitan etc. R'y Co. v. Mallett*, 92 Ala. 209. The evidence in this record brings the present case strictly within this principle. The plaintiff was a passenger being transported on a car of the defendant; the car was derailed, and she received the injuries of which she complains as a result of that derailment. The numerous authorities cited fully meet and overturn the position of counsel attempted to be based on the case of *Georgia Pac. R'y Co. v. Hughes*, 87 Ala. 610, and determine the exceptions reserved in this regard against the appellant.

12. Quite a number of medical and surgical experts were examined in this cause. The testimony of most of them consisted both of facts involved in the physical condition of the plaintiff subsequent to the accident, and of opinions as to the causes of that condition, the consequences to flow from it, the feasibility and means of relief or amelioration of it, etc. Those paragraphs of the court's general charge with respect to the testimony of these experts, to which exceptions were reserved, had reference solely to this opinion evidence, and not to any fact testified to by them. The court instructed the jury that "the opinion of expert witnesses should not be substituted for such opinion as the jury may form from the whole facts and whole evidence in this case; and this opinion should be weighed along with all the other facts in the cause"; and that "in no case should the jury accept the opinion of an expert as true, unless it agrees with their conclusions as based upon the whole facts of the case; and such opinion should be considered in connection with all the other facts in making up the conclusion of the jury upon each fact it bears upon." These paragraphs of the general charge, relating to the same matter, must be construed together. It is the settled doctrine of this court "that the general charge given *ex mero motu* in the court below should be read and construed with regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of its context; and if any part, when so considered, limited, or expanded, asserts the law correctly, it will not furnish ground for reversal, however faulty the particular clause might be if its meaning was not controlled by prior or subsequent passages": *Metropolitan etc. R'y Co. v. Stewart*, 91 Ala. 421;

Williams v. State, 83 Ala. 68; *O'Donnell v. Rodiger*, 76 Ala. 222. Looking at each of these paragraphs in the light shed upon it by the other, and limiting and expanding the several propositions of each by the context of both, or in other words, arriving at the meaning the trial court intended to convey from all that was said on the subject, as the jury must have done, we evolve out of these paragraphs no more than this proposition: that if the jury reach a given conclusion from a consideration of the whole evidence, including as well the opinions of the experts as substantive facts deposed to by witnesses, whether experts or non-experts, they are not to surrender this conclusion, which is their opinion upon the whole evidence, because the opinions of the experts do not coincide with theirs, but lead to a different result; or to express the same thought in variant phraseology, the jury are not to substitute for their own views of what is established by the whole evidence—substantive and opinion, expert and non-expert—the opinion of expert witnesses; for to thus surrender their own conclusions, and substitute instead the conclusions of witnesses as to what was proved by the evidence, would be to make such witnesses, and not the jury at all, the triers of the cause. We do not think that either of the paragraphs excepted to is an instruction on the weight to be accorded the opinion evidence. To the contrary, each and both of them leave that question entirely an open one for the jury, and only confine such opinions to the legitimate office of all evidence, that of being considered with every other fact and circumstance laid before the jury in arriving at their conception of the truth, thus guarding them against the error of allowing the expert opinions to be substituted for their own judgment. The exceptions reserved in this connection are untenable: *Rodgers on Expert Testimony*, secs. 37 et seq.; *Lawson on Expert and Opinion Evidence*, 240; *Brehm v. Great Western R. R. Co.*, 34 Barb. 256; note to *Hammond v. Woodman*, 66 Am. Dec. 230. ;

13. That part of the closing argument of plaintiff's counsel to the court's rulings in respect of which exceptions were reserved appears to have been in reply to the argument of defendant's counsel, and to have been of the same general character. The opening sentences of the language complained of are: "I never did in my life, and I challenge the gentleman to name a lawsuit in which I have been practicing law in the city of Birmingham where I have done it [abused men

who are employees of railroads]. On the contrary, gentlemen, if I may be allowed to speak my sentiments as he [counsel for defendant] has been allowed to speak his, my sympathies are always with the employees of a railroad," etc.

The fair inference from this language, which went unchallenged, so far as the fact of its being responsive to defendant's counsel is concerned, is, that if what followed is outside of the case, so, also, was the language of the opposing counsel in the same connection; and the refusal of the trial court to exclude the remarks objected to from the jury may well be justified on that ground alone. A party can have no just ground of complaint on account of remarks, improper in themselves, which have been necessitated by like remarks on the other side.

14. Charges 1, 2, and 3, requested by the defendant, and refused, being the general charge on the whole case, and upon the first and second counts, respectively, are not insisted on. Their refusal was palpably proper. Charge No. 4 of defendant's series is as follows: "If the jury believe the evidence in this cause, they must find their verdict for the defendant, under the third count of the complaint." It is strenuously insisted that this charge should have been given. The argument in its support proceeds on the theory that this charges negligence only in the running of the train at great speed, and that there is no evidence in the case tending to show negligence in the manner in which the train was run (moved) at the time and place of the accident, or that it was being run at great speed. This theory is not supported as to either of its postulates. The third count of the complaint not only alleges the negligent running of the train at a "rapid rate of speed," and that the rails at the point of derailment were old iron rails, worn, unsound, insecure, and unfit for use, and that the cross-ties on which said rails were laid were unsound, rotten, and insecure, but also "that said accident was caused by the gross negligence of said defendant in running its train at such a rate of speed over said rails, and (in addition to all this, and wholly irrespective of the running of the train or the manner and rate of such running) by the gross negligence of said defendant in using and permitting to be used said old and worn iron rails, and rotten and unsound cross-ties, after they had become unfit for use on said road."

Had the burden, beyond proof of derailment and consequent injury to a passenger, been on plaintiff to show negligence on

the part of the defendant, she would have been entitled to recover on this count on proof that the derailment was caused by the defective condition of the track, and without any evidence of negligence in respect of the running of the train: *Louisville etc. R. R. Co. v. Jones*, 83 Ala. 376. The other assumption involved in appellant's position in reference to this charge (No. 4) is equally without support. The fact that the train ran three hundred yards with some of the cars off the rails, and on the ties, and when presumably every effort was being made to stop it, is itself some evidence that a high rate of speed, amounting to negligence, especially when considered in connection with the condition of the track, was being maintained.

15. Charges 5, 6, 7, 8, 35, and 36 proceeded on the assumption that the only injuries alleged in the case or in the several counts consisted in displacement of plaintiff's womb, and in an injury to the last vertebra of her spinal column. The assumption is gratuitous, as a reading of the complaint will demonstrate. These charges were well refused.

16. The matter of exemplary damages was before this court, as were many other points now again presented, on the former appeal. We then said: "We discover no error in the rulings of the trial court on the question of punitive damages. There was evidence in the case tending to show that the cross-ties, or a considerable portion of them, under the track at the point of the derailment of the car in which plaintiff was riding, the wreck being the result of a broken rail, were 'unsound,' 'decayed,' 'rotten'; that the rail which broke was an 'old rail,' as were others along there, and that the defendant company was 'constantly repairing that old track with old rails.' With the weight or sufficiency of this evidence we have nothing to do. Whether or not its tendencies were entirely rebutted by other testimony is also beyond our inquiry. Those were questions for the jury. We are satisfied that it tended to show a condition of the track, not to know and remedy which was such gross negligence on the part of the company as implied recklessness and wantonness,—such indifference to the probable consequences of its continued use, such disregard of the safety of passengers being transported over it,—as is the equivalent of intentional wrong or a willingness to inflict the injuries complained of. And if the jury found the facts to be in accordance with this tendency of the

testimony, they were authorized to return a verdict for exemplary damages."

The evidence in this record is substantially the same on this subject as that adduced on the former trial. The conclusion then reached we now reaffirm. What was then said, however, is open to criticism in that it authorized the conclusion that recklessness or wantonness could be predicated of the mere omission of a duty to know the condition of the track which the evidence tended to establish. That this was an inaccurate statement of the doctrine was attempted to be demonstrated by the present writer in the subsequent case of *Georgia Pac. R'y Co. v. Lee*, 92 Ala. 263, and the inaccuracy was specifically pointed out in the yet later case of *Richmond etc. R. R. Co. v. Vance*, 93 Ala. 144. That statement, however, was an abstraction. No result depended upon it there, and none depends on it here. As we reiterated in the case last cited, the condition of the rails and cross-ties, and the fact of old rails being used constantly to repair that old track, was sufficient to authorize an inference on the part of the jury that the defendant knew of this condition of things, and to impute to them such recklessness or wantonness as is the equivalent of conscious wrong-doing in continuing to run trains over a track in such dangerous condition. So finding, the jury were further authorized to impose punitive damages. It follows that the several charges requested by the defendant below on the assumption or to the effect that there was no evidence in the case of recklessness or wantonness were properly refused: *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764; *Georgia Pac. R'y Co. v. Lee*, 92 Ala. 263; *Richmond etc. R. R. Co. v. Vance*, 93 Ala. 144.

17. Charge 20, requested in this connection, is bad, in that its tendency is to limit the imposition of vindictive damages to cases in which there is an "entire want of care" on the part of the defendant in respect of maintenance of its track, if not also in postulating facts, of some of which there is no evidence. Some degree of care may have been exercised in the maintenance of the track, and yet it may have been consciously left in such condition as that to run trains over it would probably have resulted in disasters of the kind alleged here.

18. The court is under no obligation to single out the testimony of one or more witnesses, and instruct the jury to reach certain conclusions if such testimony be believed. To do so

has a tendency to give undue prominence to the evidence of the witnesses thus separately set before the jury, and to obscure and minimize other evidence bearing on the point. Such would have been the tendency of charge 21, requested by the defendant, with respect to the testimony of Drs. Gaston and Johnston, and its refusal may be justified on that ground: *Salm v. State*, 89 Ala. 56; *Kennedy v. State*, 85 Ala. 327; *Fariss v. State*, 85 Ala. 1.

19. In *Calhoun v. Hannan*, 87 Ala. 277, this court said: "The burden being on the plaintiff to show falsity of the affidavit in respect to the ground alleged for the issuance of the attachment, he must reasonably satisfy the minds of the jury in this regard. Manifestly, if their minds are left in a state of confusion and uncertainty on this point, the plaintiff has failed to make out this very essential part of his case, and cannot recover." This case is relied on to support the exceptions reserved to the action of the trial court in refusing to give charges which asserted that if the jury were "in doubt and uncertainty" as to certain facts essential to the plaintiff's case, they should find against her. The case is not authority to the point. The mind may be reasonably satisfied of a given fact, and yet not be certain of it, nor free from doubt in respect of it; but no mind can be said to be reasonably satisfied as to the existence of a particular fact which is in a state of confusion — the synonym, when applied to mental processes and conditions, of bewilderment and distraction — in respect thereto. These charges would have required a greater measure of proof than is necessary even in criminal cases, in that the conviction on the part of the jury would have had to be to the exclusion of doubt and uncertainty, whether reasonable or not: *Harris v. Russell*, 93 Ala. 59.

A number of other charges were requested by the defendant, and refused. They have all received careful consideration. We shall not, however, further extend this opinion by a discussion of them in detail. Each of them will be found to be either unsound in the abstract, or argumentative, or misleading, or invasive of the province of the jury, or to assume the existence of evidence not found or the non-existence of evidence which is found in this record, and many of them are open to more than one of these objections. Similarly, we pretermitt discussion of three or four rulings on the evidence, because the objections to them are obviously lacking in merit. Every point made in the case has been considered, — a great

number of them, indeed, were passed on when the case was here before, — and all plausible exceptions have been written upon. We find no error in any ruling of the trial court, and the judgment is affirmed.

TRIAL — PERSONAL EXAMINATION — DISCRETION OF COURT. — It is within the sound discretion of the trial court to order the surgical examination by experts of the person of a plaintiff seeking to recover for personal injury: *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764, and note; *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 719; 14 Am. St. Rep. 189, and note; *Owens v. Kansas City etc. R'y Co.*, 95 Mo. 169; 6 Am. St. Rep. 39, and note; *Sidokum v. Wabash etc. R'y Co.*, 93 Mo. 400; 3 Am. St. Rep. 549, and extended note.

STATUTES — RETROACTIVE — CONSTRUCTION OF. — A rule of practice prescribed by statute for an appellate court applies to all cases pending in that court, though they were determined by the trial court before the statute was enacted: *South West Imp. Co. v. Smith*, 85 Va. 306; 17 Am. St. Rep. 59. A statute shall always be interpreted so as to operate prospectively, and not retrospectively, unless the language is so clear as to remove all doubt as to the contrary intent of the legislature: *Lane's Appeal*, 57 Conn. 182; 14 Am. St. Rep. 94, and note; *Williams v. Johnson*, 80 Md. 500; 96 Am. Dec. 613, and note; *Richardson v. Cook*, 37 Vt. 599; 88 Am. Dec. 622, and note; *Grimes v. Norris*, 6 Cal. 621; 65 Am. Dec. 545, and note; note to *Kennebec Purchase v. Laboree*, 11 Am. Dec. 98; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 408; *Lane v. White*, 140 Pa. St. 99.

EVIDENCE — PERSONAL INJURIES — ELEMENTS OF DAMAGE. — In an action for damages for personal injury, plaintiff's physical capacity at the time of and previous to the injury may be shown: *Alabama etc. R. R. Co. v. Yarbrough*, 83 Ala. 238; 3 Am. St. Rep. 715, and note.

RAILROADS — DEFECTIVE ROAD-BED — EVIDENCE. — In an action by a passenger against a railroad company to recover for personal injuries caused by reason of a broken rail, evidence as to the condition of the railroad ties at the place of the accident, as to their soundness and the condition of the road-bed there at the time the ties were removed and the road repaired, six months after the accident happened, is competent, as tending to show the condition at the time of the accident: *Stewart v. Everts*, 76 Wis. 35; 20 Am. St. Rep. 17, and note with cases on this subject collected.

RAILROADS — ACCIDENT — PRESUMPTION OF NEGLIGENCE FROM. — From the happening of an accident on a railway train the negligence of the defendant is presumed, in the absence of any evidence tending to show that the accident did not arise from want of care on his part: *Breen v. New York etc. R. R. Co.*, 109 N. Y. 297; 4 Am. St. Rep. 450, and note; *Philadelphia etc. R. R. Co. v. Anderson*, 94 Pa. St. 351; 39 Am. Rep. 787; *Furnish v. Missouri Pac. R'y Co.*, 102 Mo. 438; 22 Am. St. Rep. 781, and note; *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519; 20 Am. St. Rep. 483, and extended note; extended note to *Ingalls v. Bills*, 43 Am. Dec. 363. But the rule that the mere happening of an accident to a passenger while in the hands of a carrier raises a *prima facie* presumption of negligence cannot be invoked where there is no evidence tending to connect the carrier with the happening of the accident: *Pennsylvania R. R. Co. v. MacKinney*, 124 Pa. St. 462; 10 Am. St. Rep. 601, and note.

RAILROADS — UNSAFE CONDITION OF TRACK — EXEMPLARY DAMAGES. — Exemplary damages are authorized from an injury to a passenger arising from an accident caused by a broken rail, when the evidence shows an unsafe condition of the track at that place so long as to make the failure to discover it gross negligence: *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764, and note.

RAILROADS AS CARRIERS OF PASSENGERS — DILIGENCE REQUIRED. — It is the duty of a railroad company to use the greatest care in providing for the safety of passengers: *Texas etc. R'y Co. v. Miller*, 79 Tex. 78; 23 Am. St. Rep. 308, and note; *Furnish v. Missouri Pac. R'y Co.*, 102 Mo. 438; 22 Am. St. Rep. 781, and note; *Ingalls v. Bille*, 9 Met. 1; 43 Am. Dec. 346, and extended note.

LUNSFORD v. DIETRICH.

[93 ALABAMA, 565.]

MALICIOUS PROSECUTION. — THE BURDEN OF PROOF RESTS UPON PLAINTIFF, in an action for malicious prosecution, to show that the prosecution of which he complained was both malicious and without probable cause.

MALICIOUS PROSECUTION. — MALICE MAY BE INFERRED FROM ABSENCE OF PROBABLE CAUSE.

MALICIOUS PROSECUTION. — EVIDENCE OF THE ANXIETY OF THE PROSECUTOR to have the plaintiff arrested, and his efforts to procure or aid such arrest, is material, as tending to establish malice.

MALICIOUS PROSECUTION. — MALICE does not necessarily consist of a desire to injure the accused. Any other motive than a *bona fide* purpose to bring him to punishment as a violator of the criminal law, or associated with such purpose, is malicious. Whatever is done willfully and purposely, whether the motive be to injure the accused, to gain some advantage to the prosecutor, or through wantonness or recklessness, if it be at the same time wrong and unlawful, within the knowledge of the actor, is, in legal contemplation, maliciously done.

MALICIOUS PROSECUTION. — PROBABLE CAUSE IS a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the person accused is guilty of the offense charged.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — MERE SUSPICION OR BELIEF, however honestly or intensely entertained, unless supported by facts known to the prosecutor which would justify a reasonable and cautious man in believing the accused to be guilty, cannot constitute probable cause.

MALICIOUS PROSECUTION. — THE BURDEN OF PROOF OF PROBABLE CAUSE must be assumed by the defendant, if the plaintiff was tried and acquitted of the offense charged.

MALICIOUS PROSECUTION. — PROBABLE CAUSE cannot be established merely by proving that the prosecution was undertaken from public motives.

LARCENY involves felonious intent, and fraud or secretiveness in its effectuation. Therefore, an instruction that larceny is ordinarily the taking and removing, by trespass, of personal property which the trespasser knows belongs to another, with intent to deprive him of his property, is rightfully refused.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — BELIEF IN THE GUILT OF AN ACCUSED is an essential element of probable cause, and if such belief is not generated in the mind of the prosecutor, it is not material that the known facts and circumstances were such as might have generated it in the mind of a prudent and cautious man.

MALICIOUS PROSECUTION. — THE MAKING OF A CORRECT STATEMENT TO THE MAGISTRATE who issued the warrant of arrest will not relieve the prosecutor from liability, if, after making such statement, he verified a complaint charging a criminal offense.

JURY TRIAL. — IMPROPER REMARKS OF COUNSEL do not of themselves constitute any ground of review in an appellate court, though they were excepted to when made, unless the trial court was requested to take some action, and erred in refusing or granting the request.

ACTION by Dietrich to recover damages for his malicious prosecution on a charge of larceny preferred by the defendant. The defendant, when about to erect a building, employed one Rousseau as his architect, who was to be compensated for his services by the payment of \$250 on the completion of the plans and specifications, and a credit of a like sum on a debt owing from him to the defendant. Plaintiff was employed in Rousseau's office at the time the contract for the services of the architect was entered into, and he prepared some of the plans and specifications. Afterwards, he formed a partnership with Rousseau, and went to the defendant, and demanded payment of the balance which he claimed to be due, and being told that payment had been made to Rousseau, he obtained possession of and destroyed the plans and specifications, and then offered to reproduce them for five hundred dollars. On being informed of the abstraction of these papers, defendant went to a justice of the peace and complained, but was told by the latter that the charge of larceny could not be sustained. A suit in detinue was therefore brought. On learning that the papers had been destroyed, and that the suit in detinue must therefore be unavailing, defendant went to another justice of the peace, and correctly stated to him the facts of the case, after which the complaint was drawn charging the plaintiff with larceny, and was verified by the defendant, and a warrant thereon issued for the arrest of the plaintiff. The trial court was asked by the defendant to give certain instructions to the jury, of which the following were refused: "5. The burden is on the plaintiff to give in evidence facts sufficient to satisfy the jury that the defendant, in instituting a criminal prosecution against him, had no ground for the proceeding but a desire to injure him. 9. That assuming the evidence in this case to be true, malice

of defendant cannot be inferred; the burden was on the plaintiff to prove it. 10. That in respect to a criminal prosecution, probable cause is conduct of the accused tending to show that the prosecution was undertaken from public motives, or such facts as would induce a reasonable man to commence a prosecution, or circumstances sufficient to warrant a prudent man in the belief that the party (the plaintiff in this case) is guilty, or such state of facts as would lead a man of ordinary caution and prudence to entertain a belief of guilt. 11. The jury cannot find that the defendant, in prosecuting plaintiff for larceny, did so out of malice, unless the facts in evidence are such as to satisfy any reasonable mind that the defendant had no ground for the proceeding but his desire to injure the plaintiff. 13. Larceny is ordinarily the taking and removing, by trespass, of personal property which the trespasser knows belongs, either generally or specially, to another, with the intent to deprive the general or special owner of his property. 14. If the facts and circumstances of the taking and carrying away by the plaintiff of the drawings and plans before that time delivered to the defendant were calculated to produce at the time, in the mind of a prudent and reasonable man, a well-grounded belief or suspicion of plaintiff's guilt of larceny, or other indictable offense, then malice cannot be inferred or implied from the want of probable cause. 15. If the jury believe from the evidence that defendant, before he made the complaint on oath before Justice Poe, on which the warrant was issued under which plaintiff was arrested, stated the facts connected with the taking of the plans of the building by plaintiff, and the justice of the peace misconceived the remedy or process, without suggestion or intervention by the defendant in that particular, defendant is not liable for such error. 16. If defendant acted under the honest belief that the plaintiff was guilty of the offense of larceny with which he was charged, then the jury must find for the defendant. 19. The unconditional delivery by the plaintiff to the defendant of the plans and drawings which plaintiff and Rousseau had made for the building he was erecting made them the special property of the defendant; and the subsequent tearing and taking such plans and drawings by plaintiff, without the consent of the defendant, was a trespass, and if secretly done, and without calling attention of any one to the act, constitutes probable cause for the defendant to cause his arrest. In such case the jury must find for the defendant. 28. That if

defendant had contracted with and paid Rousseau for making the plans and to superintend Lunsford's building; that plaintiff, having demanded additional compensation of Lunsford, and being refused, went without Lunsford's consent, and took and destroyed the 'front elevation' with the intent to deprive Lunsford of his property, or to injure Lunsford, — then the court charges the jury that this was probable cause for causing plaintiff's arrest on the charge of larceny, if defendant honestly believed that these facts constituted larceny, and the jury must find for defendant. 24. That in considering defendant's conduct, even if the jury should believe the facts did not warrant the arrest of plaintiff, still they will make allowance for the excitement under which the prosecution for the alleged offense was instituted. The complainant cannot be required to act with the same impartiality and absence of prejudice in drawing his conclusions as to the guilt of the accused that a person entirely disinterested would deliberately do."

W. C. Ward, for the appellant.

R. H. Pearson, for the respondent.

McCLELLAN, J. This is an action by Dietrich against Lunsford for malicious prosecution. The institution of a criminal prosecution by the latter, and its termination before suit brought, were admitted, or at least not controverted. On the trial, the burden was on the plaintiff to show further, both that that prosecution was malicious and that it was instituted without probable cause. The proof of neither of these factors in the right of recovery would avail plaintiff, in the absence of proof of the other. However malicious Lunsford may have been, he is not liable in this action if he had probable cause for bringing the charge against Dietrich; and however his action was lacking in the basis of probable cause, he would not be liable, unless actuated therein by malice: *McLeod v. McLeod*, 73 Ala. 42; *Steed v. Knowles*, 79 Ala. 446; *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 225; *Lunsford v. Dietrich*, 86 Ala. 250; 11 Am. St. Rep. 37; *Leyenberger v. Paul*, 12 Ill. App. 635; *Meysenberg v. Engelke*, 18 Mo. App. 346; *Murphy v. Martin*, 58 Wis. 276; *Flickinger v. Wagner*, 46 Md. 580. But while the absence of probable cause is not the equivalent of malice, and does not *per se* establish malice, yet it is evidence of malice to be considered by the jury, and may of itself jus

tify a conclusion on their part that the motive of the prosecutor was malicious: *Authorities supra*; *Southwestern R. R. Co. v. Mitchell*, 80 Ga. 438; *Bozeman v. Shaw*, 87 Ark. 160; *Mowry v. Whipple*, 8 R. L. 360; *Diets v. Langfitt*, 63 Pa. St. 234; *Strauss v. Young*, 36 Md. 246.

Malice may also be inferred, of course, from the circumstances surrounding and attending upon the prosecution, the conduct and declarations of the prosecutor, his activity in and about the case, his efforts therein to secure some personal end. Indeed, the existence of malice being a fact which, in the nature of things, is incapable of positive, direct proof, it must, of necessity, be rested on inferences and deductions from facts which can be laid before the jury; and hence it is that a wide range is permitted in adducing attendant circumstances which tend to throw any light on the subject. We do not doubt but that the apparent anxiety of Lunsford, after making the complaint, to have Dietrich arrested, and his efforts to that end at the depot, as a phase of the evidence tends to show, was such a circumstance, and properly allowed to go to the jury: *Strauss v. Young*, 36 Md. 246; *Motes v. Bates*, 80 Ala. 382.

It is quite erroneous to suppose, as stated or implied in some of defendant's requests for instructions, that an element of the malice necessary to support this action consists in a desire to injure the party prosecuted. Any other motive than a *bona fide* purpose to bring the accused to punishment as a violator of the criminal law, or associated with such *bona fide* purpose, is malicious. There need be no personal ill-will, desire for revenge, or other base and malignant passion. Whatever is done willfully and purposely, whether the motive be to injure the accused, to gain some advantage to the prosecutor, or through mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, is in legal contemplation maliciously done: *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 220; *Ross v. Longworthy*, 18 Neb. 492; *Spear v. Hiles*, 67 Wis. 350; *Forbes v. Hagman*, 75 Va. 168; *Mitchell v. Wall*, 111 Mass. 492; *Pullen v. Glidden*, 66 Me. 202.

Probable cause which will defeat an action for malicious prosecution is defined to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged": *Davis v. Wisher*, 72 Ill. 262; *Cole v. Curtis*, 16 Minn. 182; *Brown v. Willoughby*, 5

Col. 1. Or as defined by this court: "Probable cause is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, to believe that the person accused is guilty": *Jordan v. Alabama etc. R. R. Co.*, 81 Ala. 225. And in deciding upon its existence, the prosecutor's belief in the guilt or innocence of the party cannot be considered; nor does the existence of such facts as might have influenced his judgment; but the test is the effect they might have upon the judgment of ordinarily prudent and reasonable men: *Ramsey v. Arrott*, 64 Tex. 320. These definitions wholly exclude the idea that mere suspicions and belief, however honestly and intensely entertained, unsupported by facts known to the prosecutor, which would have justified reasonable and cautious men in believing the accused to be guilty, constitute probable cause: *Hirsch v. Feeney*, 83 Ill. 548; *Graeter v. Williams*, 55 Ind. 461; *Flickinger v. Wagner*, 46 Md. 580; *Mowry v. Whipple*, 8 R. I. 360.

The foregoing general principles will suffice to justify the trial court's action with respect to most of the instructions refused to the defendant. They were either affirmatively bad, or so misleading as to authorize their denial. Thus charges 5 and 11 assert defendant's immunity, unless the jury should find he had no ground for the prosecution except a desire to injure the plaintiff. There might well have been, in the mind of the jury, some ground for his conduct falling short of probable cause, and some malicious motive other than his desire to injure; and neither the existence of such ground nor the absence of such desire would necessarily have imposed on them the duty of returning a verdict for the defendant. Charge 9 assumes either that there was no evidence of a want of probable cause, or that malice could not be inferred from the absence of such cause. Both assumptions are unfounded. We have seen that the inference of malice may be drawn from a want of probable cause; and the fact that Dietrich had been tried and acquitted of the offense charged was itself some evidence — sufficient, it seems, to lift the burden of proof in that regard off the plaintiff — of a want of probable cause. *Josselyn v. McAllister*, 25 Mich. 45; *Vinal v. Core*, 18 W. Va. 1.

Charge 10 is faulty in its first proposition, if not otherwise. Conduct of the accused merely tending to show that the prosecution was undertaken from public motives is not probable cause. The tendency in that regard might fall far short of

establishing facts and circumstances upon which ordinarily prudent and cautious men would institute a prosecution.

It is quite true that larceny includes a trespass; but it is more than a trespass, in that it involves felonious intent, and fraud or secretiveness in its effectuation. Knowledge of another's ownership, and intent to deprive him of his property, are not equivalent to and cannot supply felonious intent, and fraud or secretiveness essential to larceny. Charge 18 is not a sound definition of larceny, and greatly tends to mislead, in view of the testimony going to show that the taking was open and avowed: *Lunsford v. Dietrich*, 86 Ala. 250; 11 Am. St. Rep. 37.

One fault of the fourteenth instruction requested by the defendant, sufficient of itself to justify its refusal, is, that it denied the jury's right to infer malice from a want of probable cause, because of the mere existence of facts and circumstances calculated to produce in the mind of a prudent and cautious man a well-grounded belief or suspicion of the guilt of the accused, whether these facts and circumstances were known or honestly believed to exist by the prosecutor or not. The existence of the facts, without knowledge of or belief in them by defendant, could not serve to rebut any inference of malice which the jury might otherwise draw from the want of probable cause: *Lunsford v. Dietrich*, 86 Ala. 250; 11 Am. St. Rep. 37.

It may be conceded that had the prosecutor made a statement in writing of the real facts connected with the taking of the plans by Dietrich, under oath, to the justice of the peace, and the latter had misconceived the remedy or process adapted to or issuable thereon, without suggestion or intervention by the defendant, the latter would not be liable for such error of the officer. But that is not this case. The statement here made and verified was not of the transaction in detail, but was a charge that Dietrich had taken and carried away the plans, with the intent to steal the same. Upon such statement there could be, and was, no misconception on the part of the justice as to the appropriate remedy or process. And the fact that Lunsford had previously made a detailed statement of the facts to the officer cannot avail to relieve him from liability for making the affidavit upon which the prosecution proceeded. Charge 15 asked by the defendant was properly refused. Charges 19 and 24 were abstract. There is no evidence in the record that the plans were secretly taken and carried away, as postulated in the former, nor of any excite-

ment on the part of the prosecutor, as postulated in the latter. Charges 16 and 23, refused to the defendant, are not in harmony with the general principles we have stated with respect to the constituents of probable cause, of larceny, and of that belief which excludes the conclusion of malice. They were properly refused.

We are unable to perceive any legitimate bearing which the state of indebtedness between Rousseau and Dietrich when their partnership was dissolved, or the effect the destruction of the plans had on the progress of the building toward completion, could have had on any issue involved in this case. Evidence on those questions was wholly irrelevant.

Plaintiff's counsel, in his argument to the jury, stated that his client's character had been damaged by the arrest and charge of larceny preferred by the defendant, and that he was entitled to be indemnified in damages. "The defendant," the bill of exceptions recites, "excepted to this remark, because no such damages were claimed, and no proof offered to sustain the claim. The court did not exclude the remarks, and counsel did not withdraw them." Was there any motion to exclude them? Was there any action of the court invoked or had in respect to them? Clearly not. All that was done, as appears from the bill of exceptions, was the noting of an exception to certain language of counsel. Nothing that the court ruled, did, or said is presented for revision; and the functions of this court in its appellate character are strictly confined to the action of the trial courts upon questions which are presented to and ruled upon by them. If the statement complained of was improper, of which we are by no means convinced, the presumption is, that it would have been excluded, and the jury duly cautioned against being influenced by it, had the attention of the trial judge been called to it and his action invoked upon it; and we cannot put him in error for failure to rule on a matter which has never been presented for his decision, or decided by him: *Clarke v. State*, 78 Ala. 476; 56 Am. Rep. 45; *East Tennessee etc. R. R. Co. v. Bayliss*, 75 Ala. 466; *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571; *Nelson v. Harrington*, 72 Wis. 591; 7 Am. St. Rep. 900; *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; *ante*, p. 28.

Affirmed.

MALICIOUS PROSECUTION — BURDEN OF PROVING MALICE. — The burden of proof is on the plaintiff to show, in an action for malicious prosecution, want of probable cause: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep.

SEE In an action for malicious prosecution, the burden is upon the plaintiff to show malice and want of probable cause by the defendant: *Anderson v. Hoss*, 116 N. Y. 386; *Joiner v. Ocean S. S. Co.*, 86 Ga. 238; *Jones v. Irwin*, 25 Neb. 76; *Dreyfus v. Aul*, 29 Neb. 191.

MALICIOUS PROSECUTION — MALICE, WHEN INFERRED. — Malice may be inferred from want of probable cause: *Brand v. Hinchman*, 68 Mich. 599; 13 Am. St. Rep. 362, and note; *Merriam v. Mitchell*, 13 Me. 439; 29 Am. Dec. 514, and note; *Southwestern R. R. Co. v. Mitchell*, 80 Ga. 438; but the deduction of malice from want of probable cause is not a necessary one: *Smith v. Burrus*, 106 Mo. 94; 27 Am. St. Rep. 329, and note; see *Chicago etc. R. R. Co. v. Kristi*, 30 Neb. 216.

MALICIOUS PROSECUTION. — THE BURDEN OF PROVING PROBABLE CAUSE is upon the defendant, who must rebut the *prima facie* proof of implied malice against him: *Cotatament v. Cropper*, 41 La. Ann. 303.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — An arrest and prosecution instituted merely to enforce a civil right is without probable cause: *Jackson v. Linnington*, 47 Kan. 396; 27 Am. St. Rep. 300, and note. If the prosecutor does not in fact believe the accused to be guilty, the defense of probable cause cannot exist: *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. 174, and note; extended note to *Ross v. Hixon*, 26 Am. St. Rep. 138. To constitute probable cause for a criminal prosecution, the prosecutor need not act from public motives: *Woodman v. Prescott*, 65 N. H. 224.

MALICIOUS PROSECUTION. — MALICE: See extended note to *Ross v. Hixon*, 26 Am. St. Rep. 127.

TERRY v. BIRMINGHAM NATIONAL BANK.

[98 ALABAMA, 500.]

TROVER. — TO CONSTITUTE A CONVERSION, there must be a tortious detention of personal property from the owner, or its destruction, or an exclusion or defiance of the owner's right, or a withholding of the possession under a claim of title inconsistent with that of the owner.

PLEDGE IS NOT GUILTY OF CONVERSION of stock pledged to him, if he sells it without giving notice to the pledgor and reports the sale as being made to another person, who surrenders the certificate and obtains new ones in his own name, if such person never paid anything, and his name was used by the pledgee to effect the sale for the latter's interest, and the stock was always in the possession of such pledgee, and he, on learning that the sale was invalid for want of notice to the pledgor, thereafter gave new notice to the latter, and under such notice sold the stock and applied the proceeds towards the payment of the debt secured by the pledgor.

EVIDENCE. — BOOKS OF A PRIVATE CORPORATION are not admissible as original evidence against third persons of facts therein stated, when the person who made the entries in such books is alive, and may be, but is not, called upon to testify concerning the facts detailed therein.

EVIDENCE. — BOOKS OF A STOCK EXCHANGE are not admissible against a pledgor for the purpose of showing that certain stocks were sold as directed by a power of attorney executed by him, the date of the sale, and the price realized, if the secretary who kept such books is still liv-

ing, and might be, but is not, called to testify regarding the transaction, though the stock exchange was by the power of attorney constituted an agent of the pledgor for the purpose of making the sale.

EVIDENCE. — DECLARATIONS AND ADMISSIONS OF AN AGENT as to past transactions do not bind his principal, and are not admissible as evidence against him.

DAMAGES, MEASURE OF, FOR CONVERSION. — If there is a wrongful conversion of stock by a pledgee, the proper measure of damages therefor is the value of the stock at the time of the conversion, with interest thereon from such time; but the jury may, in their discretion, if they think the justice of the case requires it, give the highest value of the stock at any time between the conversion and the trial.

ACTION against R. J. Terry upon a promissory note payable to the cashier of the bank. The defendant pleaded as a set-off that fifty shares of stock of the Edison Electric Company, of the value of five thousand dollars, had been sold by defendant and converted to its own use, also failure of consideration, in that the note sued upon was given for such stock, which was not delivered to defendant, and finally, by way of counterclaim, that the said shares were held as collateral security for the payment of the note, and had been sold without authority and converted to plaintiff's use. At the trial, there was evidence tending to prove that the stock had been sold without giving the pledgor notice, and subsequently, that a sale thereof had been made after notice and the proceeds applied to the payment of the debt secured. The jury was instructed that "if there was a wrongful conversion of the stock of the plaintiff, then a proper measure of the defendant's damages on account of said conversion would be the value of the stock at the time of the conversion, with interest thereon from the time of the conversion to the time it was applied as a credit on defendant's note; but the jury may, in their discretion, if they think the justice of the case requires it, give, in case of such wrong, the highest market value of the stock at any time between the conversion and the trial." The defendant asked for the following instructions, which were refused: 1. "If the jury find that the plaintiff converted the defendant's stock, and that the value of said stock, with the dividends thereon added, amounts to more than the balance due on the note, the jury should say, 'We, the jury, find for the defendant against the plaintiff, and assess his damages at \$——.'" 2. "The purchase of Terry's stock by plaintiff, and having the certificates for the same canceled on the books of the Edison Electric Light and Illuminating Company, and reissued to White, was a conversion of the stock by plaintiff."

3. "The transfer of the R. J. Terry stock to F. S. White operated as a discharge of said stock from the pledge as collateral, and reinvested Terry with the right and title to said stock."

4. "The evidence in the case fails to show that the defendant's stock was sold in accordance with the power of attorney given by him."

5. "If the jury believe that plaintiff converted the defendant's stock, then they may charge defendant [plaintiff?] with the highest market price shown by the proof, and also the dividends shown by the proof, if any shown to have been paid on said stock, and this amount should be set off against the note; and if there is a balance over after paying the note, the verdict should be for the defendant."

6. "The court charges the jury to find for the defendant, if they believe the evidence." 7. "If the jury believe from the evidence that there was no consideration for the note sued on, they will find for the defendant."

Lane and White, for the appellant.

Cabaniss and Weakley, and Mountjoy and Tomlinson, for the respondent.

COLEMAN, J. The assignments of error present no question which brings before us for consideration any ruling of the court upon the pleadings. The contention that the note sued upon was without consideration, or that it was given with the privilege to cancel the same within ninety days, is without merit. The proof shows that the Edison Electric Illuminating Company received from the bank the money for which the note was given, and in consideration thereof fifty shares of its stock was issued in the name of the defendant, E. J. Terry, and numbered 26 and 27, each for twenty-five shares. The first note was made in June, 1887, renewed and extended, with the interest added, in September, 1887, and again in October, 1887, again in January, 1888, and again in April, and again in May, 1888, at which time the note sued upon was executed. The certificates of stock were indorsed by R. J. Terry in blank, were attached to and pledged to the bank as collateral to secure the payment of the note, and afterwards other collaterals were pledged to further secure the payment of the note. In July, 1888, R. J. Terry, in writing, constituted and appointed R. D. Johnston, who was the president of the bank, his attorney, to sell, through any stock-broker he might select on the Stock Exchange, the fifty shares of stock pledged, the proceeds to be

applied to the note. A mere statement of the facts is a sufficient answer to these two grounds of contention.

It is next contended that the pledgee was guilty of a conversion of the stock pledged. The pledgee, without notice to the pledgor, sold the stock hypothecated, and Frank S. White was reported as the purchaser. The original certificates, Nos. 26 and 27, were surrendered, and new certificates issued in the name of Frank S. White, numbered 89 and 90. These certificates were indorsed in blank by White, and remained in the possession of the bank. The proof showed that White never paid anything for the certificates, or claimed them; that his name was merely used by the bank as a convenience, in order to effect a sale of the stock, and that the bank was the real purchaser. After this sale, the pledgee, learning that a sale of the pledge could not be legally made without notice to the pledgor, notified R. J. Terry, in writing, of the intention to sell the stock. The proof shows that the bank held the certificates of stock all the time they were in the name of White, and during this time it was in the power of the bank to return the stock to the pledgor upon the payment of the note to secure which the stock was hypothecated.

In the case of *Day v. Holmes*, 103 Mass. 806, it was held that where there was no contract of sale of the stock, no money or other consideration paid or agreed to be paid therefor by the transferee, and the stock was taken back by indorsement in blank from the transferee, so that the stock remained under the control of the pledgee, ready for delivery to the pledgor on payment of the note, there was no conversion; and the same rule was declared in *Fay v. Gray*, 124 Mass. 500. To constitute a conversion, there must be a tortious detention of the property from the owner, or its destruction, or the exclusion or defiance of the owner's right, or a withholding of the possession under a claim of title inconsistent with that of the owner: *Conner v. Allen*, 33 Ala. 516; *Thweat v. Stamps*, 67 Ala. 98; *Penny v. State*, 88 Ala. 106.

The evidence shows that the pledgee recognized the stock to be that of Terry, subject to the hypothecation, although the certificates were issued in the name of White. The notice given of the intended sale of the stock on the Stock Exchange was a recognition of the right of the pledgor. Whether these facts were proven or not was properly left to the jury. The dealings of the bank in regard to the hypothecated certificates of stock, the credits entered on the note, were entered on the

books of the bank. The evidence shows that the pledgor was a stockholder in the bank, a member of the finance committee, and a director at the time and for some time after the hypothecation of the stock. We must presume he had access to the books, and knew the condition of his note and collaterals, at least so long as he held this relation to the bank.

There is no difficulty in tracing the stock originally issued by the Edison Electric Light Company in the name of R. J. Terry to its present holder, James H. Little. The stock-book of the company shows that Nos. 26 and 27, of twenty-five shares each, were issued to R. J. Terry. The stock-book further shows that the certificates representing these numbers were returned and canceled, and the same stock was reissued to White as Nos. 89 and 90; that these were returned and canceled, and reissued as 101 and 102 to E. W. Rucker, and 101 and 102 canceled, and reissued to James H. Little, the present holder, as 106 and 107.

The evidence tended to show that between the hypothecation of the stock and the trial the value of the stock varied from thirty cents to par, and defendant claimed as a set-off the highest market value. As evidence tending to show that the stock was sold on the Stock Exchange as directed by the power of attorney of the pledgor, and the date of the sale, and the price at which the stock was sold, the plaintiff introduced in evidence the books of the Stock Exchange in which was recorded the sales. It was shown that Louis Frierson was the secretary of the company, that the entries were in his handwriting, and that he was alive and in the city, and no showing was made to account for his absence. It was testified that the book was the regular stock-book of sales; that it was correctly kept, and the entries in the handwriting of the secretary. Upon this proof, the books were admitted as evidence, against the objection of the defendant. The exception presents for decision the question of the admissibility of the books of a private corporation as original evidence against third persons upon such preliminary proof as was made in this case.

It has been declared that an exception to the general rule that the best evidence must be produced obtains in the case of public writings, as it would be improper to permit them to be transported from place to place. The Bank of the State of Alabama and its branches are the property of the public, and there can be no doubt that its books are public writings, and

are within the rule: *Crawford v. Branch Bank*, 8 Ala. 80. Mr. Wharton says bank-books are admissible as showing a *prima facie* case against the bank, by whom the entries are made, and a party dealing with the bank, so far as he has made the person making the entries his agent. Entries made by strangers, however, without the knowledge of the litigants, cannot be received as against either of the litigants. Ordinarily, bank-books are not evidence in suits to which the bank is not a party, without proving such books by the clerk who made the entry, if within process, or proving his handwriting, if he is outside of process: 2 Wharton on Evidence, sec. 1131. At common law the admissibility of the books of the corporation depended upon the nature of the acts recorded. If they were obviously of a public character, and the entries made by a proper officer, they will be received in evidence for or against the corporation: 2 Taylor on Evidence, sec. 1781. But the author does not extend the rule to acts of a private character, where the corporation is not a party. In Morawetz on Private Corporations, sec. 40, it is said that the books of a corporation are admissible against the company and its members only on the principle that they are admissions; they are not evidence against strangers. The same author declares that it is well settled that the stock-books are admissible as independent evidence to show who are the stockholders of a company, although he adds "it is difficult to support it by any principle of common law": Secs. 75, 76. The Stock Exchange is a private corporation, and the weight of authority and the better rule is, that the entries in its books, as independent evidence against third persons, must stand upon the same footing as entries made in the books of companies, partnerships, and individuals.

In the case of *Union Bank v. Knapp*, 3 Pick. 96, reported in 15 Am. Dec., after reviewing many authorities, in a note on page 195 the conclusion reached was declared to be, that original entries, made in the regular course of the business by a third person, and in some jurisdictions by the party in interest himself, are admissible in evidence, after his death, insanity, or absence from the state, upon proof of his handwriting. If the person who made the entries is alive, and within reach of the process of the court, he must be called to authenticate them. In the case of *Elliott v. Dycke*, 78 Ala. 157, it was held that "when a witness is shown to be dead, or beyond the jurisdiction of the court, written entries and

memorials of a transaction, entered in the usual course of business, and which are shown to be in the handwriting of the absent or deceased witness, and purport or are shown to have been made at or about the time of such alleged transaction, are admissible in evidence in any issue involving the transaction to which they relate." The case of *Hancock v. Kelly*, 81 Ala. 378, is to the same effect.

It is insisted that R. J. Terry directed that the Stock Exchange should sell the stock, and for this purpose the Stock Exchange was his agent. The power of attorney of the pledgor, in which he directed that the stock should be sold by the Stock Exchange, for the purposes of a sale, made the Stock Exchange his agent, and it is argued that Terry is bound by the entries in the stock-book, as admissions made by an agent. The only ground upon which the entries could be admissible as the declarations and admissions of an agent binding upon the principal is, that they were explanatory of some contemporaneous act within the scope of his authority, forming part of the *res gestæ*. It is well settled that the admissions of an agent as to bygone transactions do not bind his principal: *Bradford v. Haggerthy*, 11 Ala. 701; *Alabama etc. R. R. Co. v. Hawks*, 72 Ala. 117; 47 Am. Rep. 403; 3 Brickell's Digest, p. 25, secs. 107, 108; *Western Union Tel. Co. v. Way*, 83 Ala. 554. The declarations and admissions themselves are not competent as independent evidence to prove they were made contemporaneously with the act, or to show they were *res gestæ*. This must be proven by evidence *aliunde*. The witness Embrey, by whom the preliminary proof in regard to the books was made, did not pretend to testify that he saw the entries made, or knew when they were made. His evidence on this point was, that he did not keep the books, but that Louis Frierson, the secretary, kept them. The proof showed that Louis Frierson was alive, and within the jurisdiction of the court, and his absence was not accounted for. The admission of the book was clearly erroneous.

The charge of the court in regard to the measure of damages is fully sustained by the authorities: *Linam v. Reeves*, 68 Ala. 89; *Burke v. Hubbard*, 69 Ala. 384.

The rulings of the court as to the consideration and validity of the note, and the conversion of the stock by plaintiff, as embodied in the charges given and refused, applicable to the evidence before the jury, are in accord with the principles of law herein declared.

For the error in admitting in evidence the book of sales of the Stock Exchange Company, without first laying a sufficient predicate, the cause must be reversed.

Reversed and remanded. —

TROVER — CONVERSION — WHAT CONSTITUTES. — Conversion, to sustain trover, must be a destruction of the plaintiff's property, or some unlawful interference with his use, enjoyment, or dominion over it, or a withholding of possession under a claim of title inconsistent with the title of the owner: *Bolling v. Kirby*, 90 Ala. 215; 24 Am. St. Rep. 789, and extended note; *Mopheters v. Page*, 83 Me. 234; 23 Am. St. Rep. 772, and note; *Hale v. Ames*, 2 T. B. Mon. 143; 15 Am. Dec. 150, and extended note.

CONVERSION OF PLEDGED STOCK — WHAT AMOUNTS TO: See *Kullman v. Greenbaum*, 92 Cal. 403; 27 Am. St. Rep. 150; and *Swain v. Wilson*, 90 Cal. 126; 25 Am. St. Rep. 110, and note.

CONVERSION OF PLEDGED STOCK — DAMAGES FOR. — The measure of damages for the wrongful conversion of delinquent stock is its value at the time of the conversion, or within a reasonable time thereafter: *Budd v. Multnomah etc. Ry Co.*, 15 Or. 413; 3 Am. St. Rep. 169. See also *Wright v. Bank*, 110 N. Y. 237; 6 Am. St. Rep. 356, and note.

EVIDENCE — BOOKS OF PRIVATE CORPORATIONS AS. — Books of account of a corporation are not of themselves competent evidence to establish the liability of a director to the corporation: *Rudd v. Robinson*, 126 N. Y. 113; 22 Am. St. Rep. 816, and note. In an action on an oral contract of insurance to recover for a loss thereunder, the company's book of entries of risks taken, in which the alleged contract is not entered, is not admissible to prove that there was no contract: *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448; 77 Am. Dec. 419. The books of a corporation may be received in evidence in controversies between the members, but they are not evidence against strangers: *Commonwealth v. Woelpler*, 3 Serg. & R. 29; 8 Am. Dec. 628, and note.

EVIDENCE — DECLARATIONS OF AGENT AS TO PAST ACTS AS. — The declarations of an agent after the fact to which his authority extends are inadmissible to charge his principal: *Whiteford v. Burchmyer*, 1 Gill, 127; 39 Am. Dec. 640, and note; *Reynolds v. Rowley*, 3 Rob. (La.) 201; 38 Am. Dec. 233; *State Bank v. Johnson*, 1 Mill Const. 404; 12 Am. Dec. 645. See also *International etc. R. R. Co. v. Telephone etc. Co.*, 69 Tex. 277; 5 Am. St. Rep. 45.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

HULL v. STATE.

[29 FLORIDA, 79.]

CONSTITUTIONAL LAW — TAX SALES — EXTENDING TIME OF REDEMPTION. —

A purchase of land by a private party at tax sale is a contract, which, together with the right of redemption therefrom, is governed by the law in force at the time of the sale, and the time for redemption can neither be shortened nor extended by subsequent legislation.

William B. Lamar, attorney-general, for the plaintiff in error.

W. B. Owens, for the defendant in error.

RANEY, C. J. The fifty-fourth section of the General Revenue Act, approved June 13, 1887, chapter 3681, Laws of Florida, authorized any person claiming land sold for taxes, or any creditor of any such person, to redeem the land, on the terms and in the manner therein stated, "within one year next succeeding the sale"; and the fifty-seventh section of the same statute enacted that on the presentation of the certificate of sale to the clerk of the circuit court, or his deputy, "after the expiration of time provided by law in this act for the redemption of land sold as aforesaid, unless the same have been redeemed, he shall execute to the purchaser, or his heirs or assigns, a deed of the land therein described, unless it shall be shown that the taxes for that year have been paid before the sale."

In the case before us, J. C. Greeley bought at a tax sale made by D. P. Smith, as tax collector of Duval County, on the fifth day of August, 1890, the land mentioned in the proceedings, the same having been sold for the collection of unpaid

state and county taxes assessed for the year 1889. Smith, as such collector, issued to Greeley the usual certificate of sale, bearing date August 5, 1890, and afterwards Greeley assigned the certificate to Rollins, who, on the tenth day of November, 1891, presented the certificate to the plaintiff in error, clerk of the circuit court of Duval County, and demanded that he should execute and deliver to him a tax deed for the land, in accordance with law, he at the same time tendering to the clerk his lawful fee for such deed. The clerk refused to issue the deed, and thereupon Rollins applied to the judge of the fourth circuit for a writ of *mandamus* to compel him to issue it.

The provisions of the seventh and eighth sections of a statute approved June 10, 1891, and entitled "An act to provide for certifying lands to the comptroller, upon which taxes have not been paid for the redemption thereof, and for the forfeiture and sale of lands not redeemed" (chapter 4011 of the statutes), are the sole defense made by the clerk to the writ of *mandamus* issued by the judge.

The effect of preceding sections of this statute is, that after the first day of January, 1892, there should be no sales of lands for either state or county taxes, and that the tax collectors of the several counties should open their books for the collection of taxes on the first Monday in November, 1891, and close them on the first Monday in April, 1892, and do likewise for each succeeding year, and when they shall have closed their books "as now or herein provided," it shall not be lawful for them to receive further moneys remaining due for taxes on land. All lands upon which taxes have not been paid are then to be certified to the comptroller and clerks of the circuit court, and the comptroller is required to make publication within one year of all lands so certified to him, except such as may have been redeemed before such publication or are not subject to taxation. Redemption in the offices of the comptroller and clerks of the circuit court are then provided for, and the state's title to all lands not redeemed at the expiration of two years from such certification becomes absolute, and the lands are to be placed on sale by the state, subject, however, to the right of redemption at any time after the expiration of the two years from the certification, if the land has not been sold by the state.

The seventh and eighth sections are as follows: —

"Sec. 7. No deeds, as now provided by law, shall issue upon any tax certificate now outstanding, for two years from

the passage of this act; and any person or persons whose lands may have heretofore been sold for taxes, and to which tax deeds shall not have been issued at the time of the passage of this act, shall, at any time within two years from the passage of this act, have the right to redeem said lands by taking the steps now provided by law for the redemption of lands from tax sales.

"Sec. 8. Tax deeds to all lands upon which tax certificates may be now outstanding, and which shall not have been redeemed, as provided in section 7, shall, at the expiration of two years from the passage of this act, issue as provided by law at the time of the passage of this act."

The ninth section provides for the grading and pricing of all lands to which the state may acquire title under the act; and the tenth section, for the sale of the same and the deed of conveyance of those sold. The eleventh section repeals all laws and parts of laws in so far as they may be in conflict with the act; and the twelfth section is, that the act "shall be construed in connection with the General Revenue Law," — such a statute (c. 4010) having been passed at the same session of the legislature, and approved on the same day.

The question presented for our decision is the validity of the act of 1891, chapter 4011, in so far as it proposes to extend the time for redemption of the purchase made by Greeley at the tax sale of August 5, 1890. It is contended by the relator that the statute is, both as to himself and to Greeley, unconstitutional and void, for the reason that it violates the contract of the sale.

The rights of Greeley and his assignee are contractual, and not, as in *Essex Public Road Board v. Skinkle*, 140 U. S. 334, a matter of mere public regulation or policy, nor a mere matter of law. Greeley's rights arose in a contract of bargain and sale. The land was offered for sale by the state, through its official agent, the tax collector of Duval County, under a statute, the validity of which is not impeached, and a compliance with whose essential provisions as to assessment and sale is not questioned, even if it be that the appellant could raise both or either of such questions in this proceeding. The land was offered for sale under the terms and conditions prescribed by the act of 1887, chapter 3681, and one of these was, that the purchaser should have a deed of conveyance of the land, unless the same should be redeemed within one year next succeeding the sale, by making the payments prescribed.

Greeley, on this offer being made at public outcry, bid for the land, and his bid was accepted, and he having paid the amount required by law, the formal certificate evidencing the sale to him, and stating that he would be entitled to a deed if the land should not be redeemed within a year, was issued to him. The entry into the agreement was the act of the parties. The state offered the land for sale, Greeley voluntarily made a lawful bid, and the bid was accepted and then complied with. It was a contract between the state and Greeley, and its terms were embodied in the law then in force: *State v. Foley*, 30 Minn. 350. The terms of the contract, in so far as the rights of the purchaser, and the duties or obligations of the state, are to be found in the law authorizing the sale, or under which it was made. "But," says Judge Taney, speaking for the supreme court of the United States in *Bronson v. Kinzie*, 1 How. 311, 315, "the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract"; and in *Cargill v. Power*, 1 Mich. 369, the decision was, that the law in existence at the time a mortgage was executed and delivered was a part of the contract. The obligation of a contract consists, observes the supreme court of the United States, in its binding force upon the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them, as a measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force: *McCracken v. Hayward*, 2 How. 608. In the case of the sale of land for taxes, which can be authorized only by the state, and to which the right of redemption is a customary, if not inseparable, feature, defining, if not limiting, the rights of the purchaser and continuing those of the defaulting owner, it is to the law existing at the time of the sale that one reasonably must, and to it only that one naturally would,

look to ascertain the period of redemption and the rights of the purchaser as to title and possession. The right of redemption from a tax sale is governed by the law in force at the date of the sale: *Merrill v. Dearing*, 32 Minn. 479. That the obligation of a contract to which the state is a party is protected from violation by the state is settled law: Cooley's Constitutional Limitations, 274, 275, and note 2; *Fletcher v. Peck*, 6 Cranch, 87; *Davis v. Gray*, 16 Wall. 203.

That the extension of the time for redemption prescribed by the act of 1887—one year next after the sale—to two years from the passage of the act of 1891, or in other words, from a day in August, 1891, to one in June, 1893, is a material impairment of essential rights guaranteed to Greeley by the contract of sale, and a positive diminution of the duty imposed by the contract upon the state, seems to our minds undeniable, in the light of natural justice and common reason. By the contract right to a deed it was intended and implied that upon obtaining the deed he should have the immediate right to the ownership and exclusive possession and use of the land, with all the beneficial incidents of such ownership. This right to have a deed after the fifth day of August, 1891, and the rights incident thereto, were obligations of the contract, and to postpone, against the will of the purchaser or of his assignee the enjoyment of such rights for even a day, or the shortest period, to say nothing of a period of nearly two years, and this, too, for the purpose of offering to the owner, or a creditor, during the time, the privilege of redeeming, if he shall see fit to exercise it, is a vital and patent impairment of such obligation. This view is fully sustained by satisfactory authority. Judge Cooley, in his Constitutional Limitations, 291, expresses himself as follows: So a law is void which extends the time for the redemption of lands sold on execution or for delinquent taxes after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is, that he shall have title at the time then provided by law; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for the payment of a promissory note. And the same author, in his work on taxation, says that if the time to redeem has already expired before the passage of the new law, it is manifest such law can have no effect upon the sale; that the title having become absolute, the legislature can no more create rights in the land in favor

of the former owner than it can in favor of any other person; but if the time for redemption has not expired, and redemption is still open to the owner, the want of power is not so entirely beyond dispute. Observing that in one case (*Gault's Appeal*, 33 Pa. St. 94) it has been held that the time for redemption might be extended from one to two years, its reasoning being based on the liberal construction which should be put upon redemption laws, he still holds that the decisions to the contrary are based on reasons which are conclusive. "They," he says, "plant themselves upon the principle that the obligation of the contract is inviolable. Now, the purchase at a tax sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in one particular, it could be in all; if subject to legislative control at all, it is wholly at the legislative mercy": *Cooley on Taxation*, 2d ed., 544, 545. In *Robinson v. Howe*, 13 Wis. 341, the decision was, that where land has been sold for taxes, under a law which provided that the owner might redeem it within a specified time after the sale, it is not in the power of the legislature, by a subsequent act, although passed before the expiration of that time, to extend the privilege of redemption for a longer period; that to extend it would impair the obligation of the contract; and that an act proposing to extend the time of redemption does not affect the rights of an assignee of a tax certificate issued before the passage of the act, although the assignment was made and the tax deed was executed after the passage of the extending act and in the form which that act prescribed. In *State v. McDonald*, 26 Minn. 145, land was bought in by the state at a tax sale, and the comptroller, pursuant to the terms of the law under which the sale was made, sold and assigned the certificate of sale. After this assignment was made, the legislature passed an act requiring every person holding a tax certificate to present the same to the county auditor at least ninety days before the expiration of the time to redeem, and the auditor to notify the person in whose name the land was assessed of the time when the period of redemption would expire. Hitchings, the assignee of the certificate, did not comply with this act, and the relator, the administrator of the owner of the land, claimed, as a consequence of this omission, the right to redeem. It was held that legislation

could not, by any act subsequent to the assignment, impair to any extent the right acquired by the assignee to the fee-simple of the land, subject to the redemption provisions of the law under which the sale was made, and that the subsequent act could not, without violating the constitution, be applied to a case where the right under the sale had vested in any person, other than the state, prior to its passage. The doctrine announced in the case of *Merrill v. Dearing*, 32 Minn. 479, is, that the period of redemption can neither be shortened nor extended by legislation subsequent to the sale. In *Forqueran v. Donnelly*, 7 W. Va. 114, the decision was, that a purchaser of a part of a tract of land at a sheriff's delinquent tax sale, made in 1860, acquired by the purchase, payment of the purchase-money, and delivery to the purchaser of the sheriff's receipt therefor the right, if the land was not redeemed, in the manner prescribed by a designated section of the Virginia code, within two years from the sale, to obtain a deed in the mode and manner prescribed by other sections, with the further privilege to the owner of redeeming after the expiration of one year from such two years, if no deed had been made to the purchaser; that the right so acquired grew directly out of the contract of sale made in pursuance of the law under which it was made; that the right was an equitable right or interest, entitled, on the failure to redeem, to ripen into a full legal title, and was secured by the provision of the constitution securing contracts against violations by legislation. In *Dikeman v. Dikeman*, 11 Paige, 484, it was held that where lands have been sold for taxes or assessments during the existence of a law which entitled the purchaser to an absolute deed, or to a lease for a limited term, in case the premises were not redeemed within a specified time, it is not competent for the legislature to extend the time for redemption, and thus to deprive the purchaser of the right to the possession and enjoyment of the premises, without providing an adequate compensation to the purchaser for his loss of the use of the premises during such extension, "when," says Chancellor Walworth in this case, "Storms became the purchaser of the premises in question; therefore, if these assessments were valid and the sale regular, his contract with the corporation, under the sanction of the law of the state, entitled him to an absolute lease of the premises at the end of the two years, and to the possession and use of the same, for the full term mentioned in his certificate of sale, in case the owners of the land, or some per-

son for them, should not redeem the same within two years, as required by the laws then in force. The question, then, which arises under the act of the 25th of May, 1841, is, whether it was competent for the legislature to extend the time for redemption, for six months at least, beyond the two years, and thus to deprive the purchaser of the possession and use of the premises for a part of the term which he had purchased therein, without any compensation whatever. It is true, the fifth section of the act requires an additional percentage to be paid in case the owners shall elect to redeem within six months after the service of notice upon the occupant. But such owners are under no obligations to redeem; and there is nothing in the act requiring them to pay the purchaser the rent of the land, or any interest upon the purchase-money, during the time he is kept out of possession, where they neglect or refuse to redeem the premises within the six months. It is perfectly evident, therefore, that the effect of such a law upon the rights of a prior purchaser, who had only purchased a term of one year in the land, would be to deprive him of the half of the value of his purchase, in case the land should not be redeemed at the end of six months. . . . But in deciding upon the constitutionality of a law which is general, and which in its operation may totally destroy the vested rights of other persons, I am not at liberty to declare the law to be constitutional, merely because the injury to one of the parties in the particular case under consideration is comparatively small. For if the law is constitutional in reference to this case, it is also constitutional in reference to the purchase of a term of two or three years only, where the purchaser would probably lose the entire benefit of his purchase, and the whole amount paid for the term, by the expiration of such term before the termination of the chancery suit."

We do not understand Chancellor Walworth to decide that it would be competent for the legislature to extend the time for redemption against a purchase made before the passage of the extending law, even if such law provided just compensation, but that he was merely pronouncing judgment upon the case before him, including that of the absence from the statute of the specified provisions for interest and rental. We fail to perceive the principle upon which the vested right acquired in the property through the contract of purchase could be taken away from one private person and vested in another

for his individual use or private purposes, even upon terms of the fullest compensation.

In addition to these tax decisions, there are others of convincing analogy. In *Bronson v. Kinzie*, 1 How. 311, a mortgage contained a power to a creditor to sell on breach of the condition, and thereby pay the debt. This power, when given, was valid under the laws of the state, and it was held that laws subsequently passed, giving the mortgagor twelve months to redeem the property from the purchaser at such sale, and prohibiting the sale of the property for less than two thirds of its appraised value, so altered the remedy of the creditor as to impair the obligation of the contract, and hence were void as to such mortgage, and a sale and a purchase thereunder. See also *McCracken v. Hayward*, 2 How. 608. *Greenfield v. Dorris*, 1 Sneed, 548, adjudged unconstitutional and void, as to sales under prior deeds of trust, a statute which provided that "in all sales of real estate thereafter to be made under execution or deed of trust which by existing laws is subject to redemption, if the debtor is permitted by the purchaser or his assignee to remain in possession, he shall not be liable for rent from the date of the sale to the time of redemption; and if the purchaser or assignee shall take possession under his purchase, upon the redemption by the debtor he shall be entitled to a credit for the fair rent of the premises during the time they were in possession of the purchaser." *Carroll v. Rossiter*, 10 Minn. 174, is a case where, in 1858, and where only one year was allowed to a mortgagor to redeem from a mortgage sale, the plaintiff's grantor mortgaged to the defendant, and in 1861, when a mortgagor was by law allowed three years to redeem from such a sale, the mortgage was foreclosed by advertisement. The sheriff who made the sale gave the mortgagee, who was the purchaser, a certificate stating that the purchaser would be entitled to a conveyance in three years from the date of sale. The court held that right of redemption was governed by the law in force when the mortgage was executed, and that the certificate, nor its acceptance, did not affect the rights of the parties. See also *Goenen v. Schroeder*, 8 Minn. 387. In *Hillebert v. Porter*, 28 Minn. 496, it was held that an act of 1878, so far as it applied to mortgages executed prior to its passage, and required to be paid, for redemption from sales under the powers in such mortgages, a greater rate of interest than that required to be paid on such redemption by the laws in force at the time of

the execution of such mortgages, impairs their obligation, and is void. It is proper to note here a remark in the opinion of the court in this case as to certain earlier decisions in that state which might be relied on as conflicting with our views: "*Stone v. Bassett*, 4 Minn. 215 (298), was upon a sale under a decree in an action to foreclose, and the court held the statute regulating redemptions from sales under decrees in force at the time of the sale controlled the right of redemption. . . . The distinction in respect to rights of redemption between sales under decrees and sales under powers are more fully and clearly made by the opinions in *Heyward v. Judd*, 4 Minn. 375 (483). . . . The decision was followed — not because it was approved, but upon the rule of *stare decisis* — twice, — in *Berthold v. Holman*, 12 Minn. 335; 93 Am. Dec. 234; and *Berthold v. Fox*, 13 Minn. 501; 97 Am. Dec. 243. It is impossible that any property rights now depend on that decision, and for that reason we do not hesitate to express our disapproval of it."

In *Gault's Appeal*, 33 Pa. St. 94, which Judge Cooley refers to in his work on taxation as one sustaining the power of the legislature to extend, by subsequent legislation, the period of redemption, the passage of the extending act intervened the sale and the execution and acknowledgment of the deed. The sale was made by the sheriff under a *levari facias* issuing out of a court in which the judgment had been entered for a municipal paving claim, and it was held that until the deed was made and delivered by the sheriff, the sale — which was regarded to all intents as a judicial sale — was liable to be set aside by the court issuing the process, and to which it was returnable, and in which the deed was to be recorded, and that so long as the sale was *in fieri*, it could not be called a perfected and complete sale. The court, recognizing the rule that the obligation of no contract shall be impaired, whether it be for much or little, yet holds, even conceding there was a contract within the meaning of the constitution, that the several acts under consideration constituted a system of remedies for enforcing the taxation power, and that the legislature, whose power to regulate taxation was absolute and exclusive, and extended to seizing and selling to the highest bidder the citizen's property without notice to him, could, in the exercise of this power, and as a part and parcel of such system, pass the redeeming act as one of the necessary means to the constitutional end of enforcing the payment of taxes; that the several

statutes were the legislative mode of attaining that object, and one of them was as constitutional as the other.

The reasoning of this decision is not satisfactory to our minds. If it be that the judicial feature of the statutory system should distinguish from those in which there is no such feature, then it is only necessary to say that this feature is not a characteristic of our system.

Our conclusion is, that the contract rights acquired by Greeley under his purchase would be violated by the extension of the redemption period proposed by the subsequent statute, and that it is not within the power of the legislature to thus impair them, either as against Greeley or against his assignee, whether such assignment was made before or after the extending statute. This is not a case in which the state was the purchaser at the tax sale and held the certificate at the time of the enactment of the extending statute, and subsequently transferred it. The rule, or the effect of the statute of 1891, in such a case, or where any governmental agency, as such, holds the certificate at the passage of the statute, is not before us for adjudication: *Board of Comm'rs v. Lucas*, 93 U. S. 108; *Lucas v. Board of Comm'rs*, 44 Ind. 524; *Essex Public Board v. Skinkle*, 140 U. S. 334.

The judgment is affirmed.

CONSTITUTIONAL LAW. — IMPAIRING OBLIGATION OF CONTRACTS BY REDEMPTION LAWS: See notes to *Scobey v. Gibson*, 79 Am. Dec. 495, and *Sullivan v. Berry*, 4 Am. St. Rep. 152, as to the validity of laws affecting titles acquired under judicial sales. In the latter note reference is made to *Freeman on Executions*, sec. 315, where it is said that laws operating on the right of redemption, as where the right to redeem from execution sales is given after the creation of the debt, are generally, but not universally, sustained. In *Thompson v. Sherrill*, 51 Ark. 453, it is held that the right to redeem lands from a tax sale depends upon the statute in force at the date of the sale. To extend the time for redemption is to alter the substance of the contract, and *a fortiori* so would a law giving a right to redeem, when, by the law under which the purchase was made, the right to the deed has become absolute: *Rollins v. Wright*, 93 Cal. 395.

SUMMER v. MITCHELL.

[29 FLORIDA, 179.]

CONSTITUTIONAL LAW — POWER OF LEGISLATURE OVER DEFECTIVE ACKNOWLEDGMENTS. — In the absence of any inhibiting constitutional limitation, and except as against prior vested rights, the legislature has power to cure, by retroactive legislation, defective acknowledgments of deeds, in all cases where the purpose of the acknowledgment is the admission of the instrument acknowledged to record or its use as evidence.

CONSTITUTIONAL LAW — POWER OF LEGISLATURE OVER ACKNOWLEDGMENTS. — A statute providing that deeds theretofore executed and acknowledged in compliance with its provisions shall have the same force and effect as if executed after its passage validates, from its approval, every prior acknowledgment of a deed made out of the state conveying land therein, when the acknowledgment of such deed complies with the provisions of such statute.

DEEDS — ACKNOWLEDGMENT — DEED AS EVIDENCE TO SUPPORT. — When a deed is referred to in a certificate of acknowledgment in such manner as to connect the former with the latter, or make it substantially a part thereof, and, reading them together, there can be found a substantial compliance with the demands of the statute, the certificate should be sustained.

DEEDS — ACKNOWLEDGMENTS. — STATUTORY REQUIREMENT OF AN EXPRESS STATEMENT OF FACT in a certificate of acknowledgment cannot be supplied by a mere presumption of such fact.

DEEDS — ACKNOWLEDGMENTS — OFFICIAL CAPACITY OF OFFICER. — A certificate of acknowledgment, of itself, or aided by the instrument acknowledged, must show the title and character of the officer taking the acknowledgment, but this may be shown by the initials of the office as well as if his title were fully written out.

DEEDS — ACKNOWLEDGMENTS — OFFICIAL CAPACITY; HOW MAY APPEAR. — The title of an officer taking an acknowledgment may be written out fully in the body of the certificate, and when this is done, its omission from the signature is immaterial; or the title of the officer may be affixed to the signature, and if so, this, of itself, is sufficient, and the use of initials generally understood to stand for the title of an office will answer the same purpose as the full title.

ACKNOWLEDGMENTS — INITIALS SUFFICIENT TO INDICATE OFFICIAL CAPACITY — CLERICAL ERRORS DO NOT DEFEAT. — Initials of title of an officer are sufficient to indicate his character when taking an acknowledgment; and clerical errors are not permitted to defeat or render acknowledgments ineffectual, when they, considered alone, or read in connection with the instrument acknowledged, fairly show a compliance with the statute.

DEEDS — ACKNOWLEDGMENTS — SUFFICIENCY OF. — A certificate of acknowledgment must be held sufficient, when it shows, either alone, or aided by the instrument acknowledged, that the acknowledgment was made before or taken by any officer authorized by law to do so.

DEEDS — ACKNOWLEDGMENTS — TECHNICAL ERRORS WILL NOT DEFEAT. — It is the policy of the law to uphold certificates of acknowledgment, and whenever substantial compliance with law is found, obvious clerical errors and all technical defects or omissions will be disregarded. Inar-

tificialness in execution cannot be permitted to defeat them, if, looking at them as a whole, they reasonably and fairly comply with the law.

DEEDS — ACKNOWLEDGMENTS — EVIDENCE TO SUPPORT — PRESUMPTION. —

The instrument acknowledged may be resorted to in support of the acknowledgment; and when the same name appears as a witness to the execution of the instrument, and to the certificate of acknowledgment as the officer taking it, it will be presumed, in favor of the certificate, that both names represent the same person.

DEEDS — ACKNOWLEDGMENTS — EVIDENCE TO SUPPORT. — When a certificate of acknowledgment to an instrument states the title of an officer not authorized to take the acknowledgment, but the signature thereto, together with its suffix alone, or read in connection with the instrument, shows an officer having such authority, the signature and its suffix will control.

DEEDS — ACKNOWLEDGMENTS BY DEPUTY — PRESUMPTION. — When an instrument acknowledged in another state is valid if acknowledged before the clerk of a court, and such instrument appears to have been acknowledged before the deputy clerk of such court, and is signed by him as such, and has the seal of his office attached, it will be presumed, in favor of such acknowledgment, that the clerk had authority to appoint a deputy, and that his acknowledgment is valid.

DEEDS — ACKNOWLEDGMENTS BEFORE DEPUTY. — A certificate of acknowledgment is not the less the act of the proper officer because made by his authorized deputy.

DEEDS — ACKNOWLEDGMENTS — PRESUMPTION IN FAVOR OF — OFFICIAL SEAL. — Statutes regulating the recording of instruments do not contemplate the inscription of public official seals upon the record. If an acknowledgment of an instrument as recorded shows by its language that the official seal of the officer taking it was thereto affixed, the absence of such seal, or of anything representing it, from the record, or a transcript thereof, will not overcome the presumption that the proper seal was affixed to the original.

DEEDS — ACKNOWLEDGMENTS. — A DEPUTY whose principal is authorized to take acknowledgments to instruments may legally take them in his own name as deputy, without mentioning his principal.

ACKNOWLEDGMENTS — SEAL AS EVIDENCE. — When an officer taking an acknowledgment affixes his official seal thereto, no other evidence of his official character is required.

STATUTES OF SISTER STATE — EVIDENCE OF. — Courts do not take judicial notice of the statutes of another state. They can be proved only by producing them, or a certified copy thereof, in evidence.

DEEDS — IRREGULARITY CURED BY STATUTE — RECORD AS EVIDENCE. — When the enactment of a statute cures any irregularity in the acknowledgment of a deed to land within the state, which has been previously executed in another state, the record of such deed, made prior to the enactment of the statute, is also cured and rendered valid, and either such record, or a properly certified copy thereof, is admissible in evidence.

EVIDENCE — COPY OF RECORD OF DEED — OBJECTION, WHEN WAIVED. — If the introduction of a certified copy of the record of a deed in evidence is not objected to on the ground that it has not been shown that the original is not within the custody or control of the party offering the copy, such objection will be deemed to have been waived.

Fleming and Daniel, Bullock and Burford, and R. L. Anderson, for the appellant.

RANEY, C. J. Appellant sued appellee in ejectment, and the result was a judgment in favor of defendant.

The first error assigned is the refusal of the judge to admit in evidence a certified copy of the record of a deed of the land in controversy, a lot in Ocala, from Hubbard L. Hart and Mary Elizabeth Hart, his wife, to A. G. Summer and Henry Smith. The deed purports to have been executed for and in consideration of six hundred dollars, in Thomas County, state of Georgia, July 9, 1863. Its conclusion is as follows:—

In testimony whereof, we, the said party of the first part, have hereunto set our hands and seals this the day and year first above written.

HUBBARD L. HART. [SEAL]

M. E. HART. [SEAL]

Signed, sealed, and delivered in presence,—

JACOB KUBITSKIK.

T. C. BRACEWELL, J. P.

The certificate of the acknowledgment made by the grantors of the execution of this deed is as follows:—

State of Georgia, }
Thomas County. }

Be it remembered, that on this twenty-second day of July, A. D. 1863, personally came before me, the undersigned deputy clerk of the circuit court in and for the county and state aforesaid, Hubbard L. Hart and Mary Elizabeth Hart, who respectively acknowledged, each for himself and herself, and the said Mary Elizabeth Hart, being absent from her husband, the said Hubbard L. Hart, acknowledged voluntarily, without fear or compulsion of or from her said husband, that they signed, sealed, and delivered the foregoing instrument for the purposes therein mentioned. In witness whereof, I herewith set my hand and seal of office the day and year above mentioned.

T. C. BRACEWELL,

Deputy Clerk S. & J. C.

The deed, thus executed and acknowledged, was admitted to record in the office of the clerk of the circuit court of Marion County, on the thirtieth day of July, 1863, by the clerk of that court. His certificate of the record need not be set out. A copy of this record, duly certified March 19, 1888, by the then clerk, being offered in evidence, was objected to by defendant, on the

general ground that the deed had not been duly proven, acknowledged, and recorded as required by law, and the objection having been sustained, the ruling was excepted to.

The particulars wherein the acknowledgment or the copy of the record was objected to as being deficient are not stated in the bill of exceptions; still, whatever objection might have been taken here to the generality of the objection below had been waived by the specifications of the particular grounds of objection in the brief of counsel for appellant, upon whose behalf alone the cause has been argued before us: *Carpenter v. Dexter*, 8 Wall. 524.

These grounds of objection are: 1. That it does not appear that the parties making the acknowledgment were known to the officer taking the acknowledgment; 2. A deputy cannot take an acknowledgment; 3. It does not appear that the officer acted within his jurisdiction; 4. The acknowledgment was taken before an officer who had no authority to take acknowledgment of deeds in this state.

At the time of the execution and acknowledgment of the deed in question, viz., July, 1863, the statute regulating the acknowledgment or proof made out of the state of deeds conveying any interest in real estate within the state, for the purpose of being used, or of entitling such deeds to be recorded here, was that of February 3, 1834, entitled "An act concerning the authentication of conveyances," as amended by act of February 27, 1840. The first section of the act of 1834 provided that the deed should be acknowledged by the party or parties executing the same, or that the execution thereof by such party or parties should be proved by a subscribing witness thereto, "before the officers hereinafter named, and in the manner and form hereinafter mentioned"; and its second section enacted that no acknowledgment or proof of any such deed "executed or acknowledged out of the state should be taken by an officer or officers aforesaid, unless the officer taking the same shall know or have satisfactory proof that the person making such acknowledgment is the individual described in and who executed the deed or instrument under seal." Its third section provides, "in addition to the requisites contained in the preceding sections," for the privy examination of married women (residing out of the territory) executing such an instrument; and the fourth section made provisions as to the acknowledgments made out of the territory, but within the United States, and was

supplanted and expressly repealed by the above-mentioned act of 1840. This statute, entitled "An act in amendment of" the former act, enacted that all such instruments acknowledged out of the territory, but within the United States or its territories, with the intent to be used or recorded here, should be acknowledged or proved before one of the commissioners appointed under the act of January 24, 1831, and in those cities or counties wherein no commissioner "is or shall be appointed under said law, or in case of his sickness, death, or inability to perform the duties of his office, where he may have been appointed," that such acknowledgment and proof might be taken before the chief justice, judge, presiding justice, or president of any court of record of the United States, or of any state or territory thereof having a seal and a clerk or prothonotary; but that no proof of acknowledgment taken by any such chief justice, judge, presiding justice, or president should entitle such instrument to be recorded, unless taken within some place or district to which the jurisdiction of the court to which he belongs should extend; and that the place of taking such acknowledgment should be set forth in the certificate, and also that the court of which he was such officer was a court of record, and that such certificate of acknowledgment should be accompanied by a certificate of the clerk or prothonotary of the court, under its seal, to the effect that the former officer was duly appointed or authorized as such judge, justice, or president. The fifth section of the act of 1834 relates to acknowledgments or proofs taken out of the United States, but in North or South America, or in Europe; and the sixth or remaining section is, that the certificate of such acknowledgment as aforesaid, by the officer before whom the same shall be taken, shall contain and set forth substantially the matter required to be done or proved to make such acknowledgment effectual by this act.

The above legislation is to be found in Thompson's Digest, 181, 182, and McClellan's Digest, 216, 217, the word "state" being properly substituted for that of "territory" when applicable to Florida.

Thus the law as to such acknowledgment or proof stood in 1873, and we may further observe that up to this time acknowledgments or proof made in the state had to be made before the officer authorized by law to record the instrument, or before some judicial officer: Act of Nov. 15, 1828; McClel-

lan's Digest, sec. 6, p. 215; or before a notary public: Act of Feb. 8, 1861; McClellan's Digest, sec. 3, p. 792.

It is entirely clear that there was, in 1863, no law in this state authorizing the admission to record of a deed acknowledged out of the state, and in another state of the United States, before a deputy clerk or the clerk of any court, nor before even a judge of any such court not a court of record and having a seal and clerk or prothonotary; and unless legislation subsequent to that in force at the time this record was made had legalized the record, there was no error in the ruling of the judge excluding the transcript as evidence under section 21 of article 16 of the constitution, which section is as follows: "Deeds and mortgages which have been proved for record and recorded according to law shall be taken as *prima facie* evidence in the courts of this state without requiring proof of the execution. A certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law shall be admitted as *prima facie* evidence thereof, and of its due execution, with like effect as the original duly proved, provided it be made to appear that the original is not within the custody or control of the party offering such copy."

There was approved by the governor on the twenty-fourth day of February, 1873, a statute entitled "An act providing for the acknowledgment of deeds and other conveyances," whose first section, after providing that deeds executed in this state, of any interest in lands herein, shall be executed in the presence of two witnesses, who shall subscribe their names as such, and that the persons executing such deeds may acknowledge the execution thereof before any judge, clerk of the circuit court, notary public, or justice of the peace within the state, enacts that if any such deed or conveyance of land shall be executed in any other state, territory, or district of the United States, such deed may be executed according to the laws of such state, territory, or district, and the execution thereof may be acknowledged before any judge or clerk of a court of record, notary public, justice of the peace, or other officer authorized by the laws of such state, territory, or district to take the acknowledgment of deeds therein, or before any commissioner appointed by the governor of this state for such purpose. Its second section provides that if such deed be executed in a foreign country, it may be executed according to the laws of such country, and that any

execution thereof may be acknowledged before certain officers designated therein, they being some of those designated in the fifth section of the act of 1834, and others besides. The third section is to the effect that if any such deed or other conveyance shall be executed and acknowledged in any other state or country before any officer not having an official seal, he shall have attached thereto a certificate of the clerk, or other proper certifying officer of a court of record, or certificate of the secretary of state, minister extraordinary, minister resident, *chargé d'affaires*, commissioner, or consul, as the case may be, that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, that he believes the signature of such person subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of such state, territory, district, or foreign country. The fourth section of this statute is as follows: Any deed or conveyance heretofore executed and acknowledged in compliance with the provisions of this act shall have the same force and effect and be as valid as if the same had been executed after the passage of this act. The fifth or remaining section, providing that future conveyances not recorded within six months after their execution shall be void as against subsequent purchasers, was held void, on account of not being within the expression of the title of the act, in *Carr v. Thomas*, 18 Fla. 736.

A purpose of this act, as applicable to conveyances made in any other state of lands located here, was the adoption of the laws of that state regulating the acknowledgment of conveyances of any interest in real estate located there. This is made entirely clear by the provision of the third section, which requires that the certificate therein provided for in cases where the officer taking the acknowledgment has no official seal shall state that the deed "is executed and acknowledged according to the laws of such state, territory, district, or foreign country." This provision implies, beyond doubt, that wherever an acknowledgment shall be in accordance with the laws of the state where it was executed and acknowledged, it will be sufficient, however wanting it may be in any requisite prescribed by previous laws of our own state as to acknowledging deeds executed beyond its limits. It is unnecessary to stop to inquire if the second section of the act of 1834 is repealed; for even if it is not, and a deed acknowledged in accordance

with its provisions, as amended by the act of 1840, will still be entitled to record, it is entirely clear that the act of 1873 has established at least an additional rule, which renders any acknowledgment made in accordance with the laws of the state where it is executed sufficient, though its certificate does not state, in compliance with former legislation, that the officer taking the acknowledgment knew or had satisfactory proof that the person making it was the individual described in and who executed the deed. Had the deed in question been executed, acknowledged, and recorded subsequent to the act of 1873, there would certainly have been nothing in the first objection made to the introduction of the copy of the record thereof, nor is there anything in this objection if the fourth section, *supra*, of the act of 1873 is not ineffectual, in so far as applicable to the circumstances of the case before us.

The power of a legislature, in the absence of any inhibiting constitutional limitation, to cure by retroactive legislation defective acknowledgments in all cases where the purpose of the acknowledgment is admission of the instrument acknowledged to record, or its use as evidence, is, except as against prior vested rights, unquestionable. The legislature, when enacting the statutes of 1834 and 1840, could have dispensed with any requirement as to acknowledgments to be found in them, and this being so, it has the authority, at least in all cases of mere irregularity, or where no vested rights are affected, the power to do the same by subsequent legislation: *Cooley's Constitutional Limitations*, 5th ed., 458, 471; *City of Jacksonville v. Barnett*, 20 Fla. 525; *Webb on Record of Title*, sec. 97; *Gordon v. Collett*, 107 N. C. 362; *Barton v. Morris*, 15 Ohio, 408; *Watson v. Mercer*, 8 Pet. 88; *Buckley v. Early*, 72 Iowa, 289; *Green v. Abraham*, 43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365.

The intention of the legislature in enacting the fourth section of the act of 1873 was at least to render valid any irregularity in the acknowledgment of a deed of conveyance of land which had been previously executed in another state, if the execution of the deed and of the acknowledgment were in compliance with the laws of the state where the execution took place. This intention extended to making the acknowledgment as valid, at least from the approval of the statute, as if, at the time of the execution of the acknowledgment, the law of this state had provided that deeds of conveyance executed according to the law of the state of its execution might be

acknowledged according to the laws of the state regulating the acknowledgment there of deeds of lands located here.

Upon the trial of the cause, the plaintiff, to support the introduction of the above deed as testimony, read in evidence sections 2690, 2705, 2706, and 2707 of the code of Georgia of 1873. The substance of these sections, so far as material here, is as follows: —

Sec. 2690. A deed to lands in Georgia must be in writing, signed by the maker, attested by at least two witnesses, and delivered to the purchaser, or some one for him, and be made on a valuable or good consideration.

Sec. 2705. Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the lands lie.

Sec. 2706. To authorize the record of a deed to realty, it must, if executed in Georgia, be attested by a judge of a court of record of that state, or a justice of the peace, or notary public, or the clerk of the superior court in the county in which the three last-mentioned officers respectively hold their appointments; or if, subsequent to its execution, the deed is acknowledged in the presence of either of the above-named officers, that fact, certified on the deed by such officer, shall entitle it to be recorded.

Section 2707 relates to proof by a subscribing witness.

These sections are shown by the code to be legislation of prior date to the execution and acknowledgment of the deed under discussion.

It is apparent from the first of these sections that the deed, considered as separate from the acknowledgment, was executed in accordance with the law of Georgia; and as it was signed, sealed, and delivered in the presence of two subscribing witnesses, such execution was also, we may state, in compliance with our own laws in force at that time controlling the mere transfer of the title from Hart, and hence the deed is one which, in so far as the conveyance of Hart's fee is concerned, is valid and effectual under the laws of both states.

There was, in the Georgia law, nothing requiring the certificate to state that the officer taking the acknowledgment knew or had satisfactory proof that a person making an acknowledgment was the individual described in and who executed the deed, and this being so, the first objection made to the acknowledgment and copy of the record offered in evidence

fails: *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58; *Sanford v. Bulkley*, 30 Conn. 344.

The second and fourth objections will be considered together. Reversing the order of their statement, they are, in effect, that the acknowledgment was taken before an officer who had no authority to take it, according to (such being our understanding of the use made of the word "in," by counsel in stating their fourth objection) the laws of this state, and was moreover taken before a deputy of such officer, and that a deputy could not take such an acknowledgment.

To decide whether the acknowledgment was made before or taken by an officer recognized by the act of 1873 as competent to take it, we must first ascertain what officer took it. According to the body of the certificate, it was taken before a deputy clerk of the circuit court of Thomas County, Georgia, but when we look at the signature to the certificate, we find that he does not sign as acting in that capacity, and, moreover, we are not informed that there was any "circuit court" in Georgia. Counsel for appellant contends that the words and initials "'Deputy Clerk S. & J. C.'" stand for and mean deputy clerk of superior court and justice of peace." To reach this conclusion, they invoke the aid of the attestation of the deed, in which it will be found that a person of the same name, "T. C. Bracewell," is one of the attesting witnesses, he affixing to his signature there the initials J. P. There is no doubt that the instrument acknowledged may be resorted to for support to the acknowledgment: *Einstein v. Shouse*, 24 Fla. 490; *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58; *Owen v. Baker*, 101 Mo. 407; 20 Am. St. Rep. 618; *Wells v. Atkinson*, 24 Minn. 161; *Samuels v. Shelton*, 48 Mo. 444; *Sharpe v. Orme*, 61 Ala. 263; *Carpenter v. Dexter*, 8 Wall. 513; *Luffborough v. Parker*, 12 Serg. & R. 48. In *Carpenter v. Dexter*, 8 Wall. 513, the deed purported to have been signed, sealed, and delivered in the presence of two witnesses, one of whom signed his name as "H. Wendell, Jr." The certificate of acknowledgment purported to have been taken before and signed by "H. Wendall, Jr., Justice of the Peace," and stated that "the above-named Walter T. Davenport, who has signed and sealed and delivered the above instrument of writing, personally appeared before" such undersigned justice of the peace, and acknowledged the same, but it omitted to state, in the language of the statute, that the person making the acknowledgment was personally known to the officer to be the person

who executed the deed, or had been proved by credible witnesses to be such. The court, after observing that "one of the subscribing witnesses was the justice of the peace before whom the acknowledgment was taken," and referring to the above statement of the certificate as following immediately the attestation clause, remarks: "Read thus, with the deed, the certificate amounts to this: that the grantor personally appeared before the officer, and in his presence signed, sealed, and delivered the instrument, and then acknowledged the same before him. An affirmation in the words of the statute could not more clearly express the identity of the grantor with the party making the acknowledgment." In *Luffborough v. Parker*, 12 Serg. & R. 48, the statute required that deeds should be proved by a subscribing witness, and A B made the proof, which did not state that he was a subscribing witness, yet by reference to the deed it appears from his name that he was one, and the proof was held sufficient. It is apparent that in the former of these cases the identity of the witness and of the person taking the acknowledgment is presumed from identity of name, and that a similar presumption is made in the second case as to the person subscribing the deed as a witness and the one proving its execution; yet the court does not make this presumption supply of itself, in the former case, the express statement as to identity of the grantor and person acknowledging required by the statute to be made. In the other case, no corresponding statement as to identity was exacted by the law controlling the certificate of proof of execution. Where a deed is referred to in a certificate in such manner as to connect the former with the latter, or make it substantially a part thereof, as is the case here, and reading them together there can be found a substantial compliance with the demands of the statute, the certificate should be sustained; but we cannot supply the statutory requirement of an express statement of a fact in a certificate by a mere presumption of such fact, and for the reason that the officer's statement, and not the presumption, is the evidence expressly called for by the statute to prove the particular fact. This rule is not violated in either of the above cases, nor by our concluding here, as we do, that the witness and Deputy Clerk Bracewell were one and the same person: *Mott v. Smith*, 16 Cal. 534; *Hogans v. Carruth*, 18 Fla. 588. This conclusion or presumption does not, however, render the certificate of Bracewell sufficient under the second section of the act of

1834, there being absent from it the substantial affirmative statement as to the identity of parties to be found in *Carpenter v. Dexter*, 8 Wall. 513.

The certificate, of itself, or aided by the instrument acknowledged, must (unless parol evidence be admissible for such purpose, — a point not presented) show the character of the officer taking the acknowledgment, and when we have learned this much, we must ascertain whether he was authorized to take it. The title of the officer may be written out fully in the body of the certificate, and when this is done, its omission from the signature is immaterial: *Colby v. McOmber*, 71 Iowa, 469; *Brown v. Farran*, 3 Ohio, 140; or it may be affixed to the signature; and if so, this is of itself sufficient: Devlin on Deeds, sec. 501; *Russ v. Wingate*, 30 Miss. 440. The use of initials generally understood to stand for the title of an office will answer. In *Rowley v. Berrian*, 12 Ill. 198, where an officer affixed to his signature, "N. P. for the city of Quincy, in Adams County, Illinois," the initials were held to mean notary public; and J. P. was decided to signify justice of the peace, in *Shattuck v. People*, 4 Scam. 477. In *Russ v. Wingate*, 30 Miss. 440, the certificate began, "State of Mississippi, Hancock County," and concluded, "Given under my hand and seal, this day and year above written. Lewis Y. Folsom, J. P. H. C. [Seal]." There was no other designation of the officer, yet it was held to be a sufficient designation of the officer as a justice of the peace. See also *Finch v. Backus*, 18 Mich. 218; *Sparrow v. Hovey*, 41 Mich. 708; *State v. Manley*, 1 Over. 428; *Stinson v. Russell*, 2 Over. 40; *Major v. State*, 2 Sneed, 15; *Burton v. Pettibone*, 5 Yerg. 442. In *McDonald v. Morgan*, 27 Tex. 503, the affidavit of a subscribing witness to a deed executed in Liberty County, Texas, was made March 13, 1838, before a person signing himself "George W. Miles, R. L. C.," which was followed by a certificate of the record, on May 4, 1838, of the deed, "in my office," headed "Republic of Texas, Liberty County," and signed as above. A statute in 1841 validated all records of deeds acknowledged before certain officers, among whom was "the clerk of the county court in whose office such record is proposed to be made." The law in force at the time of the record made clerks of the county courts recorders for their respective counties, and it was held that the official character of the officer as clerk of the county court and *ex officio* recorder was sufficiently indicated. As somewhat on the same line is *Owen v. Baker*,

101 Mo. 407, 20 Am. St. Rep. 618, where there was a certificate giving at the outset the state and county, and signed "James C. Jackson, Recorder," and stating in the body that the grantor appeared "in open court" and acknowledged the deed, such certificate being followed by a statement, similarly signed, twenty days subsequently, to the effect that the subscriber had duly recorded the instrument. The statutes required the acknowledgment to be made before the circuit court of the county wherein the estate was situated, and that the clerk of the court should indorse upon the deed a certificate thereof, "under the seal of the court," and it also made the clerk of the designated court recorder of deeds. "Jackson, who signed the certificate," says the opinion, "was recorder only by virtue of his office as circuit clerk. His description of himself, therefore, as recorder indicated likewise that he was circuit clerk, and, with the recitals in the acknowledgment, made it clear that it was taken by him as clerk. As circuit clerk he was authorized to take the acknowledgment, but as recorder he had no such authority. . . . In this case the acts of the sheriff [the grantor] and court described in the certificate of Jackson were valid if performed before him as circuit clerk, but not as recorder."

Not only do the courts hold initials sufficient to indicate the character of the officer taking an acknowledgment, but they do not permit clerical errors to defeat or render acknowledgments ineffectual, when they, considered alone, or read in connection with the instrument acknowledged, fairly show a substantial compliance with the statute. In *Blythe v. Houston*, 46 Tex. 65, 79, there was offered in evidence a certified copy of the record of a deed, which was objected to, on the ground that the certificate of acknowledgment did not show of what county the officer giving the certificate was notary public, nor that he was a notary public when the acknowledgment was taken. The certificate commenced, "The state of Texas, county of Hopkins," and recited the appearance of the parties before the "undersigned authority," and concluded, "Witness my hand and official seal at Douglass, this sixth day of October, A. D. 1854," being signed, "John R. Clute, Notary Public, N. C." "The objection," says the supreme court of Texas, "was, we think, properly overruled. . . . The discrepancy between the county named in the outset and the letters designating his county appended to the signatures might easily be accounted for, and certainly was not of suffi-

cient importance to invalidate the record." In reaching this conclusion, the court remarks that *McDonald v. Morgan*, 27 Tex. 503, "is nearly in point as to the sufficiency of the signature, which, it must be assumed, was authenticated with the official seal of the notary, showing the words 'Notary Public, county of —, Texas.'" *Merchants' Bank v. Harrison*, 39 Mo. 433, 93 Am. Dec. 285, is a case in which the notary public who took the acknowledgment of a deed offered in evidence described himself in the body of the acknowledgment as a notary public within and for the county of Livingston, but appended to his signature his official character in the following words: "Notary Public, Howard County"; and the supreme court said they were inclined to think that the deed should have been admitted, but being excluded, there was still evidence enough to show a *prima facie* right to recover. In *Agan v. Shannon*, 103 Mo. 661, the certificate of acknowledgment, after stating that W. L. H. Frazier appeared in the probate court, in open court, and acknowledged the deed, concluded, including the signature, as follows: "In testimony whereof, I, W. L. H. Frazier, judge of said court, have hereunto set my hand and affixing my private seal. . . . M. L. Wyrick, Probate Judge." A private seal was affixed, and there was also a statement that no seal of office had yet been provided. It was held, overruling *Lincoln v. Thompson*, 75 Mo. 623, that the certificate was good.

Viewing the certificate of acknowledgment in the light of the Georgia law, it must be held sufficient, if we can learn from the certificate, either alone or aided by the instrument acknowledged, that the acknowledgment was made before or taken by any officer authorized by such law to do so. From the Georgia law as proved, it appears that, among other officers, either a clerk of the superior court or a justice of the peace could take, in that state, an acknowledgment of a conveyance of land situate therein; and hence if the description following and constituting a part of the signature fairly indicates either of these officers, the acknowledgment must be sustained. Invoking, as we lawfully may and properly should do, the aid of the attestation of the deed, our conclusion is, that each of the above official capacities is sufficiently indicated. The final C may, in the light of the authorities, be regarded as a clerical error, and intended for a P, and so treating it, the quotation would read, "Deputy clerk of the superior, and justice of the peace." The omission

of the word "court," or the letter C, as standing for "court," after the letter S, cannot be regarded as material, but its absence, in view of the liberal principles of law always obtaining and to be applied in support of these instruments, will be supplied. The letter S can, in view of the Georgia law, be given no other signification than as standing for "superior"; and informed, as we are, by this law that a clerk of the superior court may perform the official functions in question, we must elect between ignoring the clear indication of the words "deputy clerk superior," and defeating the acknowledgment, or of regarding them in the light of the statute and supplying the word "court" as a clerical omission, and sustaining the certificate. Instruments like these, say the authorities, must be construed, *Ut res magis valeat quam pereat*; and in dealing with them it should be the aim of the courts to preserve, and not to destroy: *Einstein v. Shouse*, 24 Fla. 490; *Kelly v. Calhoun*, 95 U. S. 710; *Carpenter v. Dexter*, 8 Wall. 513; *Touchard v. Crow*, 20 Cal. 150, 160; 81 Am. Dec. 108. It is the policy of the law, observes the supreme court of Minnesota in *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, to uphold certificates of this character, and wherever substance is found, obvious clerical errors and all technical omissions or defects will be disregarded. Again, should we read, as it might be said we should, the final C as standing for or intended to indicate the "court," so that the entire suffix to the signature should read, "Deputy clerk of superior and justice court," it seems to us entirely clear and reasonable to hold that, thus read in connection with the attestation, it was intended by the officer to indicate his dual official capacity of clerk and justice. If nothing followed the signature but "J. C.," or "justice court," we would be obliged, in view of the attestation and the law, to hold that it was a clerical error or an inaccuracy, and intended to indicate the official character of justice of the peace; and it is nothing more than reasonable to hold that the last two initials, if to be read, the former as "justice," and the latter as "court" or "courts," were used, the former as standing for justice, and the latter as applying not only to it, but also to "superior," as indicated by the letter S. Again, if it is to be assumed that J does not stand for "justice," but for some other word, there is still enough to signify the office of the clerk of the superior court.

Inartificialness in the execution of these instruments cannot be permitted to defeat them, if, looking at them as a whole.

we find that they reasonably and fairly indicate a compliance with the law.

In reaching this conclusion, we have not overlooked the use of the word "circuit," in the body of the certificate. Our judgment as to this is, that, in the absence of evidence that there is any such court in Georgia, the suffix to the signature must control, as showing that the person taking the acknowledgment was acting in the authorized official capacity indicated by it, and that the word "circuit" was written at least unadvisedly, even if by the officer himself, and is to be controlled by the designation following his signature, which is to be presumed to have been made by him, and to have been a subsequent, if not the last, act in the matter: *Carlisle v. Carlisle*, 78 Ala. 542.

In what has been said, the fact that the acknowledgment was taken by a deputy, if taken in the capacity of clerk of superior court, instead of that of a justice of the peace, has not been noticed. In *Hope v. Sawyer*, 14 Ill. 254, a question arose upon the legality of the record in Illinois of a deed acknowledged in Missouri, the certificate of acknowledgment being signed in the name of the clerk of the circuit court, "by E. Baker, Deputy Clerk." It was objected that the acknowledgment should have been made before and certified to by the clerk in person. "The objection," says the opinion, "is not well founded. The acknowledgment purports to have been taken by the clerk, and it is certified in his name and under the seal of the court. *Prima facie*, this is sufficient. The seal of the court proves itself, and we must presume that it was affixed by the proper officer. The presumption is, that the clerk was authorized by the laws of Missouri to act through a deputy, and that Baker was regularly appointed as such. The deputy had the power to use the name of the clerk and attach the seal of the court. . . . The certificate in question was none the less the act of the clerk because made by his authorized deputy": Devlin on Deeds, sec. 475; Webb on Record of Title, 62. In *Small v. Field*, 102 Mo. 104, where an acknowledgment of a deed to land in Missouri, taken before a deputy clerk of a territorial district court in Washington Territory, was held sufficient, notwithstanding the statutes of the United States providing for the appointment of the clerk of such court made no provision for a deputy, though deputy clerks of territorial courts are expressly spoken of elsewhere in the statutes, the supreme court of Missouri ob-

served: "If necessary to uphold this certificate, we would presume that a law of the territorial legislature was in existence authorizing the appointment of a deputy clerk. . . . Moreover, the seal of the court, being affixed to the certificate, carries with it *prima facie* evidence that it was rightfully affixed, and throws the burden of overcoming the *prima facie* case thus made on the objectors to the sufficiency of the certificate": *Musser v. Johnson*, 42 Mo. 74; 97 Am. Dec. 316.

In the case before us it is to be presumed from the words of the certificate to such effect, that the seal of office of the clerk of the superior court was impressed upon the original certificate. The absence from the record or from the transcript of such seal, or anything as representing it, is not sufficient to overcome the presumption created by such words. The ordinary provisions of statutes regulating the recording of instruments do not contemplate the inscription of public official seals upon the record: *Devlin on Deeds*, sec. 700; *Webb on Record of Title*, sec. 74; *Geary v. City of Kansas*, 61 Mo. 378; *Hammond v. Gordon*, 93 Mo. 223; *Ingoldsby v. Juan*, 12 Cal. 564; *Smith v. Dall*, 13 Cal. 510; *Jones v. Martin*, 16 Cal. 166; *Griffin v. Sheffield*, 38 Miss. 359; 77 Am. Dec. 646; *Hedden v. Overton*, 4 Bibb, 406; *Sneed v. Ward*, 5 Dana, 187; *Ballard v. Perry*, 28 Tex. 347; *Witt v. Harlan*, 66 Tex. 660; *Coffee v. Hendricks*, 66 Tex. 676; *Gale v. Shillock*, Dak., Oct. 6, 1886; 29 N. W. Rep. 666. In *Jones v. Martin*, 16 Cal. 166 where, as here, the body of the certificate indicated a seal by apt words, the words "No seal" appeared in the certified copy where the notarial seal should have been, and it was held that these words did not imply that no seal was affixed to the instrument by the notary who took the acknowledgment, but was a mere note of the recorder of the place of the notarial seal, which he probably had no means of recording, and which it was not necessary that he should record.

As it is to be presumed from these words of the certificate that a seal was impressed upon the original, the only distinction between the case at bar and those cited from Illinois and Missouri is, that here the certificate is signed by the deputy simply in his own name, without using that of the clerk. There is conflict of authority as to how such certificates of acknowledgment should be executed when they are made by deputies. In Tennessee it was held (*Beaumont v. Yeatman*, 8 Humph. 542) that such certificates should be in the name of the deputy; and likewise in a late case in Georgia, where an

acknowledgment was taken out of the state: *McKenzie v. Jackson*, 82 Ga. 80; and in California a certificate was held valid which stated that "before me, the undersigned, county clerk of Sonoma County, personally appeared," and was signed "John A. Brewster, Deputy County Clerk of Sonoma County," the principal's name not appearing: *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108. See also *Rose v. Newman*, 26 Tex. 131; 80 Am. Dec. 646; *Cook v. Knott*, 28 Tex. 85. In *Talbott's Devisees v. Hooser*, 12 Bush, 408, where the acknowledgment was in fact taken by the deputy clerk, but the name of the clerk alone was signed by such deputy to the certificate, the acknowledgment was decided by the supreme court of Kentucky to be valid, and this, too, although the deputy was a minor, the statute not prescribing the qualifications of a deputy. The doctrine of this case is, that all official acts should be done in the name of the clerk, and not in that of the deputy. The view expressed in *Devlin on Deeds*, sec. 474, is, that the signature of the deputy alone does not invalidate the acknowledgment, but that the better practice is for the deputy to sign the name of the principal, by himself as deputy. That this is the better rule in all cases where a deputy acts, we will not deny, but in view of the conflict of authority and the liberal views governing in cases of these acknowledgments, we cannot hold this certificate invalid on account of the manner in which the deputy has signed, but must regard it as sufficient in this aspect; and this being so, and the presumption being that the official seal of the clerk of the superior court of Thomas County, Georgia, was affixed to the original certificate of acknowledgment, and rightfully so (*Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; *Small v. Field*, 102 Mo. 104), the certificate must be sustained, though executed by a deputy, and in another state. That the act is one which in its nature may be performed by a deputy, cannot be denied: *Devlin on Deeds*, sec. 473; *Webb on Record of Title*, sec. 62; and there is, in view of the authorities cited above as to deputies and the manner in which they may sign, in the fact that the name of the clerk does not appear, nothing to except this certificate from the rule which presumes, *prima facie*, that the appointment of Bracewell as the deputy clerk was valid: *Hope v. Sawyer*, 14 Ill. 254; *Small v. Field*, 102 Mo. 104.

If we refer the taking of the acknowledgment to Bracewell's capacity as justice of the peace, then the certificate shows

that he had an official seal, as such officer, and no other evidence of such capacity is required by the act of 1873, *supra*.

In *Carpenter v. Dexter*, 8 Wall. 513, it is announced as law, that where one state recognizes acts done in pursuance of the laws of another state, the courts of the former will take judicial cognizance of these laws, so far as may be necessary to determine the validity of the acts alleged to be in conformity with them. We find no other decision to this effect, the general rule being, that the statute law of another state is to be proved according to the law of the former in which the trial is had: *Tuten v. Gazan*, 18 Fla. 751; *Sessions v. Reynolds*, 7 Smedes & M. 130; Wharton on Evidence, sec. 302; Greenleaf on Evidence, secs. 486, 489. We may remark, however, that we are not advised that the application of the rule announced by the supreme court of the United States would have led to a conclusion against the validity of the acknowledgment in question.

A further question suggesting itself is, What effect is to be given the fact that the record in Marion County was made before the act of 1873? Does this fact except such record, or a transcript thereof, from the effect of the provision of our constitution set out above? The act of 1873 was, in effect, an amendment of the existing prior legislation referred to in this opinion. As has been shown in the statement of that legislation, a purpose of it was the regulation of the acknowledgment and proof, made out of the state, of deeds of lands here, for the purpose of their being used or recorded here. Upon the approval of the act of 1873, the acknowledgment of the deed became as valid as it would have been from the date of its execution had it been acknowledged after the approval of the act, and a record of this deed made upon the originally defective acknowledgment immediately after the statute became operative would have been as valid for all purposes involved in this cause as if the deed had been acknowledged subsequent to the approval of the statute. This deed, as acknowledged, standing upon the record, as it did, at the time the act became effective, we see no good reason why the record was not from that time as valid as if it had been made immediately after the approval of the statute; or in other words, why it was not duly recorded from that time. Such, we think, was the logical and necessary effect of the statute upon the existing record. The deed was duly recorded from that time, and the record, or a certified copy, was admissible, un-

der the section of the constitution set out above: *East v. Pugh*, 71 Iowa, 162; *Fowler v. Merrill*, 11 How. 375.

No objection that the original was not within the custody or control of the party offering the copy appears to have been made, and hence we conclude that this requirement was complied with or waived.

That the officer acted within his jurisdiction appears sufficiently upon the face of the certificate: *Devlin on Deeds*, secs. 482, 486.

Other assignments of error need not be noticed.

The judgment must be reversed, and remanded for proceedings not inconsistent with this opinion. It will be so ordered.

ACKNOWLEDGMENTS, CONSTITUTIONALITY OF STATUTES CORRECTING DEFECTIVE: See note to *Barnet v. Barnet*, 16 Am. Dec. 518, — a case deciding that such acts do not affect judgments rendered prior to their passage. So where a wife joins in her husband's deed or mortgage for the purpose of releasing dower, the deed or mortgage will be wholly inoperative as to her, unless it is properly acknowledged by her, and as against her, cannot be validated by a subsequent statute passed for the purpose of curing such defects: *Grove v. Todd*, 41 Md. 633; 20 Am. Rep. 76. But a certificate of the acknowledgment of a release by a husband and wife, omitting to state that the wife was separately examined, is made good by the Pennsylvania act of the 3d of April, 1826: *Tate v. Stookfoos*, 16 Serg. & R. 35; 16 Am. Dec. 546, and note citing many cases to the same point. In *Manufacturers' etc. Gas Co. v. Douglass*, 130 Pa. St. 283, and *Cressona etc. Ass'n v. Sowers*, 134 Pa. St. 354, will be found a construction of the later Pennsylvania act of 1878. See also note to *Jordan v. Corey*, 52 Am. Dec. 525.

ACKNOWLEDGMENT, DEED AS EVIDENCE TO SUPPORT. — Certificate of acknowledgment to a deed is to be sustained if possible, and in support of it reference may be had to the instrument to which it is attached: *Touchard v. Cross*, 20 Cal. 150; 81 Am. Dec. 108.

ACKNOWLEDGMENTS, STATEMENTS REQUIRED IN. — A certificate of acknowledgment of a deed or mortgage that fails to state the fact of the acknowledgment is insufficient: *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 340. The certificate need not be in the exact form prescribed by the statute, but must contain its substance: *Einstein v. Shouse*, 24 Fla. 490; and therefore the fact that the person making the acknowledgment was known to the officer taking it must be evidenced by his certificate, and without this the authentication is not such as to entitle an instrument to record: *Salmon v. Huff*, 80 Tex. 133. See also, generally, as to compliance with statutory requirements, the extended note to *Livingston v. Kettelle*, 41 Am. Dec. 168-184.

PROOF OF OFFICIAL CHARACTER. — Acknowledgment is sufficient to render a deed admissible in evidence, when the notary, in his certificate to a deed conveying land in Livingston County, describes himself as a notary public within and for the county of Livingston, though he appends to his signature the words "Notary Public, Howard County": *Merchants' Bank v. Harrison*, 20 Mo. 433; 93 Am. Dec. 285. So where a tax deed, issued by the county clerk of Jackson County, in Kansas, is acknowledged before a justice of the peace, and the caption or venue to the certificate of acknowledgment is

"State of Kansas, Jackson County, ss.," it will be presumed that such acknowledgment was taken by a justice of the peace of Jackson County, within Kansas, and in the township where the justice of the peace resides and holds his office: *Douglass v. Bishop*, 45 Kan. 200. As to proof of official character generally, see note to *Livingston v. Kettelle*, 41 Am. Dec. 170; as to the sufficiency of initials appended to the signature to show official character, see same note, 171.

DEEDS — EFFECT OF CLERICAL ERRORS IN ACKNOWLEDGMENTS: See note to *Livingston v. Kettelle*, 41 Am. Dec. 174, 175. Dating acknowledgment before execution of deed does not invalidate the deed, and it is admissible in evidence, where such antedating was a mere clerical mistake, which deed itself sufficiently corrects: *Fisher v. Butcher*, 19 Ohio, 406; 53 Am. Dec. 436.

DEEDS — ACKNOWLEDGMENT BY DEPUTY. — Certificate of acknowledgment attested by a deputy county clerk, with the seal of court affixed, is sufficient to authorize the record of the deed, under laws providing that the acknowledgment may be taken by the clerk of a court having a seal, and that the county clerk is *ex officio* clerk of all courts having a seal, except the supreme court: *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; *Herndon v. Reed*, 82 Tex. 647; overruling the earlier case of *Miller v. Thatcher*, 9 Tex. 482; 60 Am. Dec. 172.

DEEDS — ACKNOWLEDGMENTS — PRESUMPTION IN FAVOR OF DISCHARGE OF OFFICIAL DUTY. — Officer taking acknowledgment of deed must certify same, with the day and year when it was made, and by whom, and he will be presumed to have performed his duty, and will not be supposed, without proof, to have taken the acknowledgment before the deed was executed: *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552.

DEEDS — ACKNOWLEDGMENT. — OFFICIAL SEAL OF NOTARY is indispensable part of his certificate: *Mason v. Brock*, 12 Ill. 273; 52 Am. Dec. 490.

JUDICIAL NOTICE will not be taken of the statutes of a sister state: *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159; *Osborn v. Blackburn*, 78 Wis. 209; 23 Am. St. Rep. 400; *Buchanan v. Hubbard*, 119 Ind. 187.

TRIAL — OBJECTION TO INTRODUCTION OF EVIDENCE, WHEN DEEMED TO BE WAIVED. — An exception comes too late, or must be regarded as waived, when taken to a paper offered as evidence, because it purports to be a copy, and not the original, such paper having been received as evidence without any call being made for the original, or any objection made that the paper was but a copy: *Jaeger v. Bossieux*, 15 Gratt. 83; 76 Am. Dec. 189.

CONNOR v. STATE.

[29 FLORIDA, 455.]

FALSE PRETENSES — CRIME OF, WHERE CONSUMMATED. — The receipt or obtaining of money or property obtained under false pretenses is the consummation of the offense; and if the false pretenses are made in one jurisdiction, but the property is obtained in another, the prosecution must be instituted in the latter jurisdiction.

FALSE PRETENSES — INDICTMENT MUST ALLEGE WHERE PROPERTY WAS OBTAINED. — An indictment for obtaining money by means of false pretenses which alleges that such pretenses were made in a certain county, but fails to state where the money was obtained, is insufficient.

FALSE PRETENSES — INDICTMENT MUST ALLEGE THAT PROPERTY WAS OBTAINED. — An indictment for obtaining money under false pretenses, alleging that the person defrauded, or his agent, was, by reason of and in reliance upon the alleged false pretenses, induced to part with, and did part with, his ownership in such money, is insufficient, as not alleging that the money was "obtained" by or through such pretenses.

FALSE PRETENSES. — AN INDICTMENT FOR OBTAINING MONEY by means of false pretenses, alleged to have been made in a certain county, but failing to allege where the money was obtained, and stating, in another count, that the party defrauded, "then and there," relying upon such pretenses, and believing in their truth, was "then and there" induced to part with, and did part with, his ownership in such money, is insufficient for not alleging where the money was obtained, or that it was obtained in the jurisdiction where such pretenses were made.

FALSE PRETENSES. — AN INDICTMENT FOR OBTAINING MONEY by means of false pretenses, alleged to have been made in one or two places, followed by the use of the phrase "then and there" in charging the obtaining of the money, is insufficient and uncertain as to the jurisdictional locality where the money was obtained and the crime committed.

FALSE PRETENSES — INSUFFICIENT INDICTMENT NOT CURED BY STATUTE. — An indictment for obtaining money by false pretenses, which is uncertain and insufficient for not alleging where the money was obtained, or that it was obtained in the county where the pretenses were made, is not cured by a statute providing that in all cases where an indictable offense is perpetrated within the state, and the same shall commence in one county and terminate in another, the person offending shall be liable to indictment in either county.

R. L. Anderson and R. W. Davis, for the plaintiff in error.

William B. Lamar, for the defendant in error.

RANEY, C. J. The information is for obtaining property under false pretenses. There was a motion made in the trial court to quash the information, but the motion was overruled, and error has been assigned on this action. The first ground of the motion to be noticed is the one asserting that the information does not show jurisdiction of the court to try the cause. The principle of law relied upon in support of this contention is, that the receipt of money or other property obtained under false pretenses is the consummation of the offense, and the place of its receipt by the offender is the locality of jurisdiction. The receipt or obtaining of the property is the consummation of the offense, and in the absence of a valid qualifying statute, the place of its receipt is the sole locality of jurisdiction. If the false pretenses are made in one jurisdiction, but the property is obtained in another, the prosecution must, in the absence of such a statute, be instituted in the latter jurisdiction: 7 Am. & Eng. Ency. of Law, 758, 762. In *State v.*

House, 55 Iowa, 466, where the property alleged to have been fraudulently obtained consisted of promissory notes and a mortgage securing the notes, the false pretenses were made and an agreement of settlement providing for the execution and delivery of the notes and mortgage was executed in Wright County, and afterwards the notes and mortgage were made and delivered to the defendant in Polk County, where he was indicted, tried, and convicted; and it was held that the false pretenses made in Wright County were not a crime, that an indictment would not lie there, because the notes were not obtained there, and that as the crime was consummated in Polk County, by the delivery of the papers in that county, the indictment was properly found there, no matter where the false representations which induced their delivery were made. In *Skiff v. People*, 2 Park. Cr. 139, the county of the delivery of the property was held to be the proper county for the trial of the offense, though the note for the property was not made and delivered until subsequently, and in another county. *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291, decides that where one, by false pretenses contained in a letter sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the writer in another county, the offense of obtaining goods by false pretenses is complete in the former county, and the offense must be prosecuted therein, the delivery of the goods to the common carrier being a delivery to the defendant's agent, and hence, in law, a delivery to the defendant. In *People v. Adams*, 3 Denio, 190, 45 Am. Dec. 468, Adams and another were indicted in the city of New York for obtaining money from a firm of commission merchants in that city by exhibiting to them fictitious receipts signed by the other defendant in Ohio, falsely acknowledging the delivery to such other defendants of a quantity of produce for the use of and subject to the order of the firm; and Adams pleaded that he was a natural-born citizen of Ohio, and had always resided there, and had never been in the state of New York, that the receipts were drawn and signed in Ohio, and that the offense was committed by the receipts being presented in New York to the firm by innocent agents there employed by the defendant in Ohio, and the plea was adjudged to be bad, and the indictment to have been properly found in New York; and in entire consistency with this decision it was held in *Stewart v. Jessup*, 51 Ind. 413, 19 Am. Rep. 739, that a person is not

liable to conviction and punishment in Indiana for obtaining property under false pretenses, where the property has been obtained outside of that state, although the false pretenses may have been made within it. See also *In re Carr*, 28 Kan. 1; *State v. Round*, 82 Mo. 679; *State v. Shaeffer*, 89 Mo. 271; *Commonwealth v. Taylor*, 105 Mass. 172; *Commonwealth v. Wood*, 142 Mass. 459; *Commonwealth v. Van Tuyl*, 1 Met. (Ky.) 1; 71 Am. Dec. 455.

We will defer any consideration of statutory provision that in all cases where an indictable offense shall be perpetrated in this state, and the same shall commence in any one county and terminate in another, the person offending shall be liable to indictment in either county (McClellan's Digest, sec. 4, p. 446), and will test the information, upon the point of venue, by the rules of law laid down above.

The allegations of the first count as to obtaining the money are, substituting figures for words, as follows: "And the said Connor, Chambliss, and Vogt, by means of the said false pretenses, obtained from the said bank, and the said Rollins, Morgan, and Greeley, as its managing agents and directors, certain moneys, to wit, three thousand two hundred dollars, of the value of three thousand two hundred dollars, the property of said bank. And the said bank, and the said Rollins, Morgan, and Greeley, as its directors and managing agents, then and there, by reason of the said false pretenses of the said defendants, and fully relying upon and believing in the truth thereof, were then and there induced to part with their ownership of and in the said three thousand two hundred dollars to the said Connor, Chambliss, and Vogt, and did then and there part with their ownership in said three thousand two hundred dollars to said defendants." It is apparent that there is nothing said in the first of the above-quoted sentences as to place, and hence no express statement as to where the defendants obtained the money. Assuming, as we will, for the purpose of the point under discussion, that the venue of the pretenses, as previously laid in the count, is in Marion County, still, such distinctive allegation of venue cannot be invoked to show that the defendants did obtain the money in the same locality or jurisdiction, in the absence of apt words connecting the obtaining of the money with it. The first sentence, then, fails altogether to show where the money was obtained, or where, in the light of the above authorities, the offense was consummated or is indictable; and consequently

the count must be held to be insufficient, unless we can find from the succeeding or second sentence of the quoted words that the money was obtained by the defendants in Marion County. We will admit it was the intention of the pleader that the word "there," as used in the second sentence, should refer to the county of Marion, in this state, when mentioned in the preceding parts of the information in designating the venue of the pretenses; still, this sentence, if it is not, in substance and effect, an allegation that the defendants obtained the money, will not save the count under consideration. Giving the word "there" the effect and meaning of the words "in the county of Marion, in the state of Florida," has the sentence the meaning and effect suggested? We do not think that an allegation that the person defrauded, or owner of the property, or his agent, was, by reason of and in reliance upon false pretenses of a defendant, induced to part with, and did part with, their ownership of and in certain moneys, or other property, to the defendants, is the equivalent of an allegation that the defendants obtained the money by or through such pretenses, or at all. This is not a prosecution for obtaining, under false pretenses, a signature to any written instrument, the false making whereof would be punished as forgery; but it is for obtaining or getting the possession of the money itself. The ownership of the bank in the money could have passed to the defendants without the defendants obtaining the money or the bank having parted with the money itself, or having delivered it to the defendants, or to any one. To "obtain," as defined by Webster, means "to get hold of by effort; to gain possession of; to acquire." The two former definitions give more accurately than the third the meaning of the word as used in the statute. In *State v. Lewis*, 26 Kan. 123, the information charged that upon certain false pretenses of Lewis, one Burton "paid" to him the stated sum of \$330, the money, property, and effects of certain parties, but it was not alleged that Lewis obtained any money or any other property of any one; and the question was, whether the word "paid" was the equivalent of the word "obtained." "The crime defined by the statute," says the opinion, "is not that of making a false pretense, but the provision is directed against one who obtains something, or who, in other words, gets possession of something, purposely, by effort, — that is, by false pretenses. This being true, the information does not describe the offense either in the exact words of the statute, or by adoption of other

words of substantially the same meaning with the words of the statute": *Kennedy v. State*, 34 Ohio St. 310; *Commonwealth v. Lannan*, 1 Allen, 590; *People v. Phillips*, 13 Hun, 395. The bank and its agents might have been induced by the defendants to part with the bank's ownership of and in the money to the defendants, and might have actually parted with the bank's ownership of and in the money to the defendants, and all this might have been in Marion County, and still the defendants may not have obtained possession of the money in that county, or even at all. This count does not show that the defendants obtained the money in Marion County, and hence it (when judged in the light of the law as it is set forth above) is insufficient.

Proceeding now to consider the amenability of the second count to the objection that it does not show the jurisdiction of the court, or in other words, does not show that the money was obtained or the offense committed in Marion County, it is proper to state that the averment of this count as to the defendants obtaining the money is, that the defendants, by means of the said false pretenses and said false and privy tokens, did then and there obtain from the said Land Mortgage Bank of Florida, Limited, of England, as aforesaid, and the said John F. Rollins, Morgan, and Greeley, as its agents, certain property, to wit, the sum of \$2,993, and a check and order for the payment of money of the value of \$2,993, of the property, goods, and effects of the said Land Mortgage Bank of Florida, Limited, of England, and the said Rollins, Morgan, and Greeley, as its directors and managing agents as aforesaid, and the said bank, and the said Rollins, Morgan, and Greeley, as its directors and managing agents aforesaid, relying upon and fully believing in the truth of the said false pretenses, and said false and privy tokens and paper writings of the said defendants, were then and there induced, by reason of same, to part with the said money and the said check and order for money, and the ownership therein of the said bank, and the said Rollins, Morgan, and Greeley, directors and agents aforesaid, to said defendants.

It is a settled rule that if the indictment or information is uncertain, or repugnant to itself, as to the county, or other jurisdictional locality, of the commission of the offense, or in other words, as to the venue of the offense, it will be held insufficient: 2 Hale P. C. 180; 1 Bishop's Crim. Proc., 3d ed., sec. 370; 1 Chitty's Crim. Law, 160. In *Cain v. State*, 18 Tex.

391, the indictment, after "State of Texas, county of Fayette," and the usual commencement, charged that James Cain, late of Travis County, aforesaid, yeoman, with force and arms, in the county aforesaid, on, etc., did then and there feloniously steal, take, and carry away, etc., it was held that there was manifest repugnancy as to the place or county where the offense was committed, and that it was good ground in arrest of judgment; and in *Bell v. Commonwealth*, 8 Gratt. 600, Campbell County, the county in which the indictment was found, was mentioned in the caption, and in the body of the indictment it was charged "that Alonzo G. Bell, late of the county of Roanoke, in the state of Virginia, laborer, on the tenth day of March, A. D. 1850, with force and arms, at the parish of Russell, in the county aforesaid," one bay mare of the value, etc., and the indictment was held bad as not showing with sufficient certainty that the offense was committed in Campbell County. It is observed in *State v. McCracken*, 20 Mo. 411, where two different counties were named, and the indictment was quashed, that when two different times and two different places are mentioned in an indictment, and a material fact is afterwards averred, it will not be sufficient to give venue to such fact by stating "then and there" only, for it will not do to say that, grammatically, "then and there" refer to the last antecedent time and place. See also *Regina v. Rhodes*, 2 Ld. Raym. 886; *King v. Inhabitants of Moor Critchell*, 2 East, 66; *Rex v. Kilderby*, 1 Saund. 308; *Queen v. Gunn*, 11 Mod. 66:

In view of what appears in the second count in its averments of the pretenses, and preceding what is quoted above, it is impossible to say that the word "there," as used in the quotation, this count refers only to Marion County, or locates the obtaining the money and check in that county. Though at the outset of the count it is alleged that it was in such county the defendants designedly and fraudulently pretended, still such pretending or pretenses are charged to have been made to the Land Mortgage Bank of Florida, Limited, of England, and though afterwards, but preceding the above quotation, it is charged that certain false and fraudulent papers were made in Marion County, yet in connection with these allegations the bank, the party alleged to have been defrauded, is again, and more than once, described as "of England," and in one place it, in designating a draft or order as one of the false pretenses used in obtaining the money or check, is designated as

"of England, Jacksonville, Florida." If it be that the absence of the word "city" before the word "Jacksonville" will prevent our taking judicial notice that the city of Jacksonville, in Duval County (a city, we may observe, which is incorporated by special statute, chapter 3775, approved May 21, 1887, and chapter 3776, approved June 2, 1887, and chapter 3952, approved May 16, 1889, and chapter 3953, approved May 31, 1889, and chapter 4639, approved June 9, 1891), is the place meant by the words "Jacksonville, Florida," still, we think the word "there," in the expression "then and there," in the averment as to the obtaining the money or check, is, in view of the preceding statement of the two jurisdictions, Marion County and England, entirely insufficient to show where the defendants obtained the money or check, and hence that the count is entirely uncertain as to the venue or jurisdiction of the obtaining of the things mentioned. It cannot be held to refer any more to Marion County than to England.

Tested by the rule laid down in the first paragraph of this opinion, neither of the two counts is sufficient; and for the reasons indicated as to each count, yet without saying that the first is not subject also to the criticism made of the second, the information must be quashed, unless the statute first referred to above (McClellan's Digest, sec. 4, p. 446) will save it. This statute cannot be invoked as aiding a case of this character, unless the information or indictment shows a consummation of the offense in Florida. There has been no crime committed in Florida, unless the money or the check was obtained here; and this is not shown by either count. If the information duly represented that the things were obtained in Marion County, the information would be good upon its face as against the objections considered; or if it represented that the pretenses were in Marion County, and the money and check were obtained in another county in the state, it would also be good under the above statute, unless there is something in the nature of cases of this kind which has not been suggested. If there is nothing of such kind in the nature of the case, and an information should lay both the pretenses and the obtaining in the same county, when in fact they are in different counties, a question of variance might arise, rendering it necessary to decide the question of the proper way of pleading offenses which the statute last cited was intended to apply to. The authorities cited cannot be held to be in har-

mony. Mr. Bishop approves a statement of them as they occurred: 2 Bishop's Crim. Proc., sec. 381; 1 Chitty's Crim. Law, 195; and certainly this is fairest to the accused: *People v. Dougherty*, 7 Cal. 395.

The information should have been quashed; and in view of the jurisdictional reasons leading to this conclusion, we cannot be expected to consider the numerous other objections made to the information.

The judgment will be reversed, and the cause remanded, with directions to quash the information.

FALSE PRETENSES — CRIME, WHERE CONSUMMATED. — The obtaining of money constitutes the substance of the offense. Where, therefore, the fraud is concocted and the representations are made in one state, but the scheme is consummated and the money paid in another, the crime is committed in the latter state, and the perpetrator is properly indictable there: *Commonwealth v. Van Tuyl*, 1 Met. (Ky.) 1; 71 Am. Dec. 455. Compare *Norris v. State*, 25 Ohio St. 217; 18 Am. Rep. 291; *Stewart v. Jessup*, 51 Ind. 413; 19 Am. Rep. 739.

FALSE PRETENSES — INDICTMENT, SUFFICIENCY OF. — The indictment must absolutely negative the truth of the pretenses employed: *Tyler v. State*, 2 Humph. 37; 36 Am. Dec. 298; must describe the property with at least such certainty as to enable the jury to decide whether the chattel proved to have been obtained is the same as that upon which the indictment was found: *State v. Kube*, 20 Wis. 217; 91 Am. Dec. 390; *State v. Blizzard*, 70 Md. 385; 14 Am. St. Rep. 366; and must allege who is the owner of the property; *Thomson v. People*, 24 Ill. 60; 76 Am. Dec. 733; *State v. Blizzard*, 70 Md. 385; 14 Am. St. Rep. 366. An indictment is sufficient if it alleges that the goods were obtained by the defendant by means of the false pretenses, and with the fraudulent intent particularly stated, without other averment that the owner relied upon, and was induced thereby to part with the goods: *Norris v. State*, 25 Ohio St. 217; 18 Am. Rep. 291; or if it charges that defendant, by falsely pretending that he was acting as a broker for an undisclosed principal in the purchase of goods, induced the vendor to accept his offer and sell the goods to said undisclosed principal, and to deliver the same to the defendant as his broker: *Commonwealth v. Jeffries*, 7 Allen, 548; 83 Am. Dec. 712. But an indictment for obtaining by false pretenses a signature to a note need not allege that any one suffered loss thereby: *People v. Genung*, 11 Wend. 18; 25 Am. Dec. 594. See an example of an indictment held good in *Strong v. State*, 86 Ind. 208; 44 Am. Rep. 292.

CRIMINAL LAW — INDICTMENT. — The venue must be laid for every material and issuable allegation in the indictment: *State v. Kube*, 20 Wis. 217; 91 Am. Dec. 390; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *State v. Nixon*, 18 Vt. 70; 46 Am. Dec. 135; *State v. Williams*, 4 Ind. 234; 58 Am. Dec. 627.

GOODSON v. STATE.

[29 FLORIDA, 511.]

FORGERY — INDICTMENT, WHAT MUST ALLEGE. — An indictment for uttering, publishing, and passing a false, forged, and counterfeit order for money, which fails to allege any person, firm, corporation, or company to or upon whom such order was uttered or passed, and fails to excuse this omission with any statement that the person to or upon whom it was uttered or passed was to the jurors unknown, is fatally defective.

LARCENY BY FALSE PERSONATION — INDICTMENT, WHEN INSUFFICIENT. — An indictment for larceny in procuring property by falsely personating another, which fails to allege that the property fraudulently obtained was intended by the party from whom it was obtained to be delivered to the party alleged to have been falsely personated, and which also fails to allege that the property was received by the defendant with intent to convert it to his own use, is fatally defective.

INDICTMENT — EVIDENCE OF RETURN IN OPEN COURT. — It is essential to the validity of an indictment that the records of the court show affirmatively, that it was returned or filed in open court. The bare title of a case, accompanied only by the technical name of a crime appearing in the minutes of a court, is not sufficient evidence to show that an indictment was so filed or returned, and when the presentment and filing of an indictment is supported by such evidence alone, it may be defeated by plea in abatement.

W. O. Butler, for the plaintiff in error.

William B. Lamar, attorney-general, for the defendant in error.

TAYLOR, J. The plaintiff in error, William Goodson, was indicted, at the spring term, 1889, of the circuit court of Washington County, first judicial circuit, as follows, omitting the formal introductory part of the indictment: "That William Goodson, late of the county of Washington aforesaid, in the circuit and state aforesaid, on the fourteenth day of January, A. D. 1889, with force and arms at and in the county of Washington, had in his custody and possession a certain false, forged, and counterfeit order for the payment of money, the said William Goodson then and there knowing the same to be false, forged, and counterfeited. The order was of the tenor following:—

“CHIPLEY, FLA., January the 14th, '89.

“Mr. Horn [meaning one R. C. Horn], will you please, sir, pay \$25 to Joseph Goodson for me.

“GEORGE EVERETT,
“Orange Hill.”

And the said William Goodson did then and there feloniously utter and publish the same as true, with intent thereby

then and there to injure and defraud one R. C. Horn, the said William Goodson then and there knowing the said order to be false, forged, and counterfeited, against the form of the statute in such cases made, etc. The grand jurors of the state of Florida, inquiring in and for the body of the county of Washington, upon their oaths, present that one William Goodson, of the county of Washington, on the fourteenth day of January, 1889, in the county of Washington aforesaid, feloniously, unlawfully, knowingly, and designedly did falsely pretend to one R. C. Horn that the said William Goodson was one Joseph Goodson, and that he had an order to pay money, to wit twenty-five dollars, sent and signed by one George Everett, in writing, and the said order was in the words and figures as follows:—

“ ‘CHIPLEY, FLA., January the 14th, '89.

“ ‘Mr. Horn [meaning R. C. Horn], will you please, sir, pay \$25 to Joseph Goodson for me. GEORGE EVERETT,

“ ‘Orange Hill.’

The said R. C. Horn, believing the said William Goodson to be Joseph Goodson, and that said order was signed by one George Everett, as represented by William Goodson, for said twenty-five dollars, by means of which said false pretenses the said William Goodson did then and there unlawfully, knowingly, and designedly fraudulently obtain from the said R. C. Horn twenty-five dollars, of the value of twenty-five dollars, of the property, money, goods, and chattels of the said R. C. Horn, with intent then and there to cheat and defraud the said R. C. Horn, whereas in truth and in fact the said William Goodson was not Joseph Goodson, neither was the order for twenty-five dollars signed by George Everett or sent by George Everett for twenty-five dollars, so the said William Goodson then and there well knew, against the form of the statute in such cases made,” etc. On this indictment the defendant was tried on the fourteenth day of November, 1891, the jury finding a general verdict of guilty, without any specification as to which one of the two offenses charged in the indictment their verdict should apply. The defendant's motion for a new trial being denied, he brings the case here, upon writ of error.

Before pleading to the indictment, the defendant moved the court to quash it upon the following grounds: “1. The first count in the indictment is vague and indefinite, and charges no offense known to the law; 2. The second count in the in-

dictment charges no offense known to the law, and is vague, indefinite, and uncertain."

This motion was overruled, and this ruling is assigned as the first error. While this motion to quash does not point out with any definiteness the particulars wherein the two counts of the indictment are vague, indefinite, and uncertain, still we think that the motion should have been sustained, and the indictment quashed. The first count attempts to charge the defendant with uttering, publishing, and passing a false, forged, and counterfeit order for money, but does not allege any person, firm, corporation, or company to or upon whom the same was uttered, published, or passed; neither does the indictment excuse this omission with any statement that the person to or upon whom it was uttered, published, and passed was to the jurors unknown. The reason for naming in the indictment the person upon whom the forged instrument was passed consists in the fact that it enters into and becomes a part of the description of the offense, which should be certain, not only that the defendant may accurately know who his accusers are, but that in case of a second prosecution for the same utterance and passing, he may be able accurately to plead *autre fois acquit* or *convict*, as the case may be. In 1 Chitty's Criminal Law, 211, we find the rule thus expressed: "But it is, in general, necessary to set forth the names of third persons with sufficient certainty; and therefore it seems to be generally agreed at this day that an indictment for suffering divers bakers to bake, etc., against the assize, when that offense was indictable, or for distraining divers persons without just cause, or for taking divers sums of money of divers persons for toll, cannot be supported." The same rule applies in larceny, in indictments for which the name of the owner of the stolen goods must be set out as a part of the description or identification of the property alleged to have been stolen, or else its omission must be excused by a statement in the indictment "that the owner is to the jurors unknown." The correctness of this rule was recognized at an early date in the history of this court, in *Groner v. State*, 6 Fla. 39; and has been adhered to ever since: *Sharp v. State*, 28 Fla. 359. As applied to indictments for uttering a forged instrument, the rule has been recognized and enforced in *Buckley v. State*, 2 G. Greene, 162. In that case, the allegation of the indictment as to the utterance and passing of forged and counterfeit coin was exactly like the one under

consideration, and the indictment was held bad. In *McClellan v. State*, 32 Ark. 609, the indictment in this respect was exactly like the one here, and was held bad.

The second count in this indictment is also fatally defective. It seems to be predicated upon section 41, page 364, McClellan's Digest, that provides as follows: "Whoever falsely personates or represents another, and in such assumed character receives any property intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed to have committed larceny, and be punished accordingly." Comment seems hardly necessary. In this second count there is no allegation that the property alleged to have been fraudulently obtained by the defendant was "intended by the party from whom he got it to be delivered to the party alleged to have been falsely personated"; neither is there any allegation that the defendant received the property "with intent to convert the same to his own use,"—all of which is fatal to its validity; and the omission of these essential allegations makes it fall short of charging any offense provided for by law: *Jones v. State*, 22 Fla. 532. The defendant's motion to quash should have been granted.

After the overruling of his motion to quash, the defendant entered a plea in abatement, the substance of which is, that there was no evidence upon the records of the court to show that the indictment was ever returned or presented in open court by any grand jury. This plea was overruled, and such ruling is also assigned as error. The ruling of the court below upon this plea is in the following words: "He [the court] was of the opinion that there was sufficient evidence before the court to sustain the indictment, said entry of the finding and return into court of May 17, 1889, being in the following words and figures, namely: '*State of Florida v. William Goodson. Forgery.*'" We do not think that this was sufficient evidence, or in fact any evidence at all, of the essential fact that such an indictment, or that any indictment, had been "presented or returned into open court by a grand jury." The bare style of a case, accompanied with the technical name of a crime, appearing by itself in the minutes of the court, without any explanation or other statement, cannot be said to prove anything. Had this styling of the cause been preceded with the customary statement: The grand jury came into court, or into open court, and presented the following indictment,—then the evidence would have been sufficient

and complete. Turning to the indictment itself, we find the file-marks to be as follows: "Filed May 17, 1889. W. B. Lassiter, Clerk, by J. R. Wells, D. C." There is nothing in this to indicate that it was filed or presented in open court. At the beginning of the record before us, we find the following statement made by the same clerk, who filled that office at the time this indictment purports to have been found: "Be it remembered, that on the ninth day of November, A. D. 1891, came the state of Florida, the plaintiff in the case aforesaid, and by an indictment filed with the clerk of the circuit court in his said office on the seventeenth day of May, A. D. 1891, called upon the defendant to answer," etc. While this preliminary statement by the clerk in the record may be regarded as affirmative proof that the indictment was filed in his office, as therein asserted, instead of in open court, still it falls far short of affirmatively showing that the paper was presented and filed in open court by the grand jury. This being all there is in the record upon this subject, we do not think that there is sufficient evidence, or any evidence, that this indictment was presented in open court by a grand jury, that being the only recognized manner in which the findings of a grand jury can be authoritatively presented: *Collins v. State*, 13 Fla. 651. Were the rule otherwise, it would render it possible for a designing or revengeful foreman of a grand jury to ruin any citizen by surreptitiously filing with the clerk in his office an indictment manufactured by himself alone upon which his fellow-jurors had taken no action. With the light before us, we think the defendant's plea in abatement should have been sustained.

It is unnecessary, after what has been said, to notice any other questions raised.

The judgment of the court below is reversed, with directions to quash the indictment, and to discharge the defendant from further custody or detention thereunder.

FORGERY. — As to what constitutes forgery, see monographic note to *Arnold v. Cost*, 22 Am. Dec. 306-321. As to the forgery of a note or indorsement, see note to *Coggill v. American Ex. Bank*, 49 Am. Dec. 315, 316. As to what instruments may be the subject of forgery, see note to *Hendricks v. State*, 8 Am. St. Rep. 467-470.

LARCENY, WHERE PROPERTY IS OBTAINED BY FALSE PRETEXT: See note to *Grinson v. State*, 46 Am. Rep. 183-185.

McKINNY v. STATE.

[29 FLORIDA, 335.]

ASSAULT TO RAPE—EVIDENCE OF CAPACITY. — At common law, a boy under the age of fourteen years cannot in point of law be guilty of an assault with intent to commit rape, and if he is under that age at the time of the alleged offense, evidence is inadmissible to show that in point of fact he could commit the offense.

ASSAULT TO RAPE.—A BOY UNDER THE AGE OF FOURTEEN YEARS is always presumed to be incapable of being guilty of attempting to commit rape; and in those jurisdictions where such presumption may be rebutted by proof of capacity, the burden of such proof is upon the prosecution.

ASSAULT TO RAPE.—A BOY UNDER THE AGE OF FOURTEEN YEARS cannot, under the statutes of Florida, be legally convicted of an assault to commit rape, in the absence of any evidence of his capacity to commit such offense.

R. W. and W. M. Davis, for the plaintiff in error.

William B. Lamar, for the defendant in error.

MABRY, J. The plaintiff in error was indicted at the spring term, A. D. 1891, of the Clay County circuit court for an assault upon a female child under the age of ten years, with intent feloniously and forcibly to carnally know and abuse her, and after arraignment was convicted of said offense.

The indictment charges, omitting the formal parts, "that Oscar McKinny, of the county of Clay, and state of Florida, on the twenty-first day of February, A. D. 1891, in the county and state aforesaid, in and upon one Dora Lillian Remesat, a female child under the age of ten years, to wit, of the age of eight years, feloniously did make an assault with intent her, the said Dora Lillian Remesat, then and there feloniously and forcibly to carnally know and abuse, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Florida." After verdict, plaintiff in error, by his counsel, made a motion to set aside the verdict and grant a new trial. The grounds of the motion are: 1. "Because the verdict is contrary to law." 2. "Because the verdict is contrary to the evidence." 3. "Because the verdict is contrary to the charge of the court." 4. "Because the uncontradicted evidence in the case was, that the defendant was not fourteen years of age at the time of the alleged offense, and yet the jury found him guilty of the offense with which he was charged."

This motion was overruled, and defendant excepted. No

exceptions were taken to the charge of the court, or the admissibility of any testimony. The assignments of error here cover, in substance, the same points presented in the motion for new trial. The sole inquiry presented here is the sufficiency of the evidence to sustain the verdict.

The mother of the child testified for the state, in substance, as follows: That the accused was working for her husband, helping in his barber-shop and working on his place. On the twentieth day of February, A. D. 1891, the accused was at work in their garden, and about five o'clock in the evening, while witness was upstairs attending to a fretful baby, she looked out of the window into the garden, and did not see the accused at work. Witness could see from the upper window all over the garden, except down by the side of a fence nearest to the house. She knew that her daughter was in the garden with the accused, and had been playing there. She went down to see about it, and as soon as she opened the garden gate she saw her child lying flat on the ground, with her clothes up, and the accused on top of her. They were lying with their feet towards witness. As soon as the witness entered the gate, the accused jumped up and commenced to button up his pantaloons, which were unbuttoned. Witness asked the accused what he meant by doing that. He said Lillian made him do it; she had been after him all the week to do it. Witness said if she had a pistol she would kill accused, and that she would have him arrested. She looked for something to hit accused with, and he ran away from the premises. This was in Clay County, Florida. On cross-examination, witness stated that when she looked in at the gate she saw them lying on the ground near the fence and near the chicken-house. The chicken-house was about ten feet high, and was between the gate where she entered and where they were lying. The chicken-house was joined onto the fence to the right of the gate, and was on her right hand. The accused and the child were on the other side of the chicken-house. The child did not get up when the accused did. She laid on the ground for a little time, and was not fretting or crying, and was not hurt. Witness did not see the private parts of the accused.

J. A. Peeler testified for the state, in substance, that he was sheriff of Clay County. A warrant was placed in his hands for the arrest of Oscar McKinny, for the assault upon the little girl. He tried for two days to find the accused, but

could not. He found him on Sunday night at his mother's house and arrested him.

For the defense, Georgia Cook testified that she was the mother of the accused, Oscar McKinny, and that he was not fourteen years of age; that he would be fourteen years of age on the following Tuesday, the last day of March.

Fonce Miller testified that he knew the general reputation of the accused, and that it was good; he never heard anything bad of the boy.

The defendant's statement, under oath, was, in substance, that he had the headache, and was lying down on the ground. Lillian came where he was, and was playing on him, and he pushed her off; he was not trying to do anything to her. He ran off because Mrs. Remesat said she was going to have him arrested.

This was, in substance, all of the testimony. Our statute provides that "whoever ravishes and carnally knows a female of the age of ten years or more, by force, and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be punished by death, or by imprisonment in the state penitentiary for life; and whoever assaults a female with intent to commit a rape shall be punished by imprisonment in the state penitentiary for any term of years, or for life, or by fine not exceeding one thousand dollars": Act of 1868, c. 1637, subc. 3, secs. 40-41; McClellan's Digest, p. 355, secs. 36, 37. The two clauses contained in the first section of the above statute define the single offense of rape. It is committed on a female over ten years of age by having carnal knowledge of her by force, and against her will, and on a female under ten years of age by unlawfully or carnally knowing and abusing her without regard to consent. The object of our statute was to provide a punishment for rape in all cases of the violation of females of any age. Originally, at common law, rape was defined to be the carnal knowledge of a female, forcibly and against her will: 3 Chitty's Crim. Law, 810; 1 Russell on Crimes, 904.

It seems that it was anciently doubted whether rape could be committed upon a child under ten years of age, and hence the statute 18 Eliz., c. 7, sec. 4, was enacted, by which it was provided "that if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be felony without benefit of clergy"; 3 Chitty's Crim. Law, 814. This statute

was not intended to create a new and different offense distinct from rape, but was designed to make the carnal knowledge and abuse of a child under ten years rape, irrespective of consent. And we find in 1 Hale's Pleas of the Crown, 628, written after the passage of the statute 18 Elizabeth, the definition of rape to be "the carnal knowledge of any woman above the age of ten years, against her will, and of a woman-child under the age of ten years, with or against her will." Our statute makes it rape to unlawfully or carnally know and abuse a female child under the age of ten years. This construction has been placed upon statutes like ours: *Commonwealth v. Sugland*, 4 Gray, 7; *People v. McDonald*, 9 Mich. 150; *State v. Storkey*, 63 N. C. 7; *State v. Johnston*, 76 N. C. 209; *State v. Dancy*, 83 N. C. 608. To charge, then, in an indictment under the statute, an assault with intent to unlawfully and carnally know and abuse a female child under the age of ten years is, in legal effect, to allege an assault with intent to commit a rape. The testimony of the mother of the accused (and there seems to be no contradiction in any way of it) is, that he was not fourteen years old when the offense is alleged to have been committed. He lacked but a short time of arriving at the age of fourteen; still, the testimony is positive that he had not arrived at this age when the offense is alleged to have been committed. A boy under the age of fourteen, by the common-law rule, was presumed to be incapable of committing the crime of rape. This presumption, it seems, was not so much on the ground of incapacity of mind or will, but of physical impotency, and was irrebuttable: *Williams v. State*, 20 Fla. 777, and authorities cited. It is also the rule of the common law, that a boy under the age of fourteen years cannot in point of law be guilty of an assault with intent to commit a rape, and if he were under that age at the time of the alleged offense, evidence is inadmissible to show that in point of fact he could commit the offense: *Regina v. Phillips*, 8 Car. & P. 736; *Rex v. Eldershaw*, 3 Car. & P. 396; *People v. Randolph*, 2 Park. Cr. 174, 213; 3 Lawson's Criminal Defenses, 145; 1 Bishop's Crim. Law, 6th ed., sec. 746; 2 Roscoe's Crim. Ev. 899. It was decided in *Commonwealth v. Green*, 2 Pick. 380, that a boy under the age of fourteen years may be indicted for an assault with intent to commit rape; but this seems to be the only departure outright from the common-law rule, and it was dissented from by Parker, C. J. In Ohio and New York it has been decided that while

the law presumes a boy under the age of fourteen years to be incapable of being guilty of attempting to commit the crime of rape, this presumption may be overcome by proof that in point of fact he has arrived at the age of puberty: *Williams v. State*, 14 Ohio, 222; 45 Am. Dec. 536; *People v. Randolph*, 2 Park. Cr. 174. I think there is much good reason in the rule announced in the Ohio and New York cases. The common-law rule had its origin in the nature of man and social life, environed by the then physical development of the race where established, and under certain climatic conditions. The rule might become absurd in more congenial climates and under conditions of more advanced physical development. The reason of the rule, it might well be said, had ceased under such circumstances. In no case, however, that we have found, except the one in Massachusetts, has any court gone further than to hold that the presumption of incapacity, where the accused is under the age of fourteen years, may be rebutted by evidence showing capacity. Under these decisions, the burden is on the state to show that the accused had capacity, when it was shown that he was at the time under the age of fourteen. In a later case in Ohio, while the rule in the case of *Williams v. State*, 14 Ohio, 222, 45 Am. Dec. 536, was adhered to, its correctness seems to have been doubted, and it was held that the rule would not be extended, and the burden was on the state to show capacity: *Hiltabiddle v. State*, 35 Ohio St. 52; 35 Am. Rep. 592. There is nothing in the testimony making it necessary for us to say whether or not the rule announced in Ohio and New York should obtain in this state. The testimony does not show the capacity of the accused, nor is there anything stated in reference to his physical development from which capacity may be deduced. On the evidence before us, our conclusion is, that the conviction was wrong, and the judgment is therefore reversed, and the cause remanded.

ASSAULT WITH INTENT TO RAVISH — CAPACITY — EVIDENCE OF. — An infant under fourteen years of age is presumed to be incapable of committing or attempting to commit rape. Such presumption may be rebutted by proof that he had arrived at the state of puberty, and was capable of consummating the crime of which he was accused: *Williams v. State*, 14 Ohio, 222; 45 Am. Dec. 536.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

CONWAY v. GRANT.

[88 GEORGIA, 40.]

ANIMALS — FEROCIOUS DOGS — LIABILITY OF OWNER FOR ALLOWING AT LARGE. — One who enters the rear of the premises of another, through an open gate, on lawful business, and is bitten by ferocious dogs running at large, of which he has no notice, may recover of the owner, who, knowing the vicious character of his dogs, thus allows them to run loose on his open premises.

John A. Wimpy, for the appellant.

John T. Glenn, for the appellee.

BLECKLEY, C. J. The ferocious character of the dogs and the knowledge of the owner are sufficiently alleged. The only matter of controversy is touching the fault of the plaintiff in exposing himself to attack by entering the premises of the defendant where the dogs were kept. There was an open gate in rear of the premises, and the plaintiff, according to his declaration, was on lawful business. Being in search of employment as a carpenter, and seeing indications that such work was probably carried on in a certain house, he entered the premises for the purpose of making engagement or to work, having no notice or knowledge of the dogs. In this way he became exposed and was bitten. We think a cause of action is substantially set forth. The code (sec. 2964) declares: "A person who owns or keeps a vicious or dangerous animal of any kind, and by the careless management of the same, or by allowing the same to go at liberty, another, without fault on his part, is injured thereby, such owner or keeper shall be liable in damages for such injury." The fault here

referred to is not that of being a trespasser, but that of being in some way instrumental in provoking or bringing on the attack complained of. "It must at the same time be understood that the right of redress of the injured person will be defeated if the injury was caused by his own fault. A person who irritates an animal, and is bitten or kicked in turn, is deemed in law to have consented to the damage sustained, and cannot recover. But if the fault of the injured party had no necessary or natural and usual connection with the injury, operating to produce the injury as cause produces effect, the owner of the animal will be liable. For example: The defendant keeps upon his premises a ferocious dog, and the plaintiff, having no notice that such a dog is there, trespasses in the daytime upon the premises, and the dog rushes upon him and bites him. The defendant is liable; since it is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises by day that he should be attacked by a savage dog": Bigelow on Torts, 249, 250.

Though the gate was open and the plaintiff was on lawful business, it may be that he had no strict legal right to enter the premises from the rear. But this would be no justification for leaving dangerous dogs loose on the premises, to bite him or others that might so intrude. Such dangerous means of defense against mere trespassers the law will not countenance. As general authorities on the subject, see *Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Car. & P. 297; *Curtis v. Mills*, 5 Car. & P. 489; *Loomis v. Terry*, 17 Wend. 496; 31 Am. Dec. 306; *Pierret v. Moller*, 3 E. D. Smith, 574; *Kelly v. Tilton*, 3 Keyes, 263; *Sherfey v. Bartley*, 4 Sneed, 58; 67 Am. Dec. 597; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175; *Laverone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269; note to *Knowles v. Mulder*, 16 Am. St. Rep. 631; Cooley on Torts, *345; Bishop on Non-Contract Law, secs. 1235 et seq.; 1 Thompson on Negligence, p. 220, sec. 34; *Muller v. McKesson*, 73 N. Y. 195; 29 Am. Rep. 123; *Rider v. White*, 65 N. Y. 54; 22 Am. Rep. 600.

It will be observed that the most that could possibly be said against the plaintiff is, that he trespassed by going upon the premises. This is a milder fault than going there to commit a trespass. If his purpose had been to commit a crime, the dogs would have been properly employed in resisting him. But he seems to have had a virtuous and worthy object, although his mode of executing it was doubtless injudicious. It

was not lawful to bite him by the instrumentality of dogs or other dangerous animals. The court erred in dismissing the action.

Judgment reversed.

ANIMALS — VICIOUS DOGS. — NOTICE TO OWNER OF THE ANIMAL'S CHARACTER: See *Robinson v. Marino*, 3 Wash. 434; 28 Am. St. Rep. 50, and cases referred to in the note thereto.

LIABILITY OF OWNER TO TRESPASSERS. — It is no defense to an action for injury from the bite of a vicious dog that plaintiff was a trespasser at time upon the land, if the owner of the dog, knowing of its propensities, permits it to run at large: *Sherfey v. Bartley*, 4 Sneed, 58; 67 Am. Dec. 597; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175.

HEFLIN v. STATE.

[88 GEORGIA, 151.]

JUDGES — DISQUALIFICATION — WHAT DOES NOT DISQUALIFY. — It is not a disqualification *per se* to try an indictment for perjury that the presiding judge is the same who presided at the trial in which the alleged perjury was committed, and also at the trial of another witness for perjury, who testified in the first case. Nor does any disqualification result from the fact that such judge is convinced of the guilt of the accused from facts coming to his knowledge during the course of the previous trials.

JUDGES — DISQUALIFICATIONS — WHAT DOES NOT DISQUALIFY. — A judge is not *per se* disqualified to preside on the trial of an indictment for perjury because he is convinced of the guilt of the accused, and has privately and unofficially advised the prisoner's counsel to induce his client to plead guilty.

PERJURY — ADMISSIBILITY OF EVIDENCE. — On the trial of an indictment for perjury, evidence is admissible to show that the accused, in a private interview, endeavored to influence a third person to give false evidence in the same case and in respect to the same matter in which the alleged perjury was committed.

PERJURY — ADMISSIBILITY OF DECLARATIONS. — The whole *res gestae* of a transaction, including declarations made at the time by the participants, are admissible against one accused of perjury to show that his sworn statements as to some of the particulars of such transaction were false.

PERJURY — RECORD NECESSARY TO CONVICTION. — To convict a person of perjury, alleged to have been committed on the trial of a case in a court of record, the production of the record in that case, or of a duly authenticated transcript thereof, is essential, unless the formal proofs of such judicial proceeding are waived or dispensed with by admission or otherwise.

PERJURY — ERRONEOUS INSTRUCTIONS. — When, upon a trial for perjury, alleged to have been committed on the trial of a case in a court of record, the judicial proceedings in that case are not formally proved by the production of the record therein, or by an authenticated copy thereof, and

such formal proof is not waived, instructions based upon the hypothesis that the case wherein the alleged perjury was committed has been duly proved by other evidence are erroneous and entitle the accused, if convicted, to a new trial.

THE appellant, Heflin, was indicted, tried, and convicted of perjury in falsely and maliciously swearing, on the trial of one Eddleman for the murder of one Gresham, that at the time of the shooting the witness was in an alley-way leading back of the saloon where the shooting took place; that he saw Gresham with something in his hand which the witness took to be a knife; that Gresham was advancing on Eddleman when the latter shot him; that immediately after the shooting, the witness left the place, and had never repeated what he had seen to anybody. The declarations referred to in the opinion were made immediately after the shooting by Eddleman and Gresham to the arresting officer, who testified, over the objection of the appellant, that at that time "Eddleman said that he shot Gresham because he was trying to shoot him, and called up Mr. Mehan to prove it. . . . Gresham followed me back when I went up to Mr. Eddleman, and when Eddleman made that remark, Gresham said, 'Search me; I have not got a thing in the world.'" The other facts appear in the opinion.

Frank A. Arnold, for the appellant.

C. D. Hill, solicitor-general, for the state.

BLECKLEY, C. J. 1. His honor Judge Clark, who presided in the trial of this case, was subjected to a novel and extraordinary challenge before the trial began. Counsel for the prisoner objected to his presiding, "for lack of impartiality, and for his prejudice against him," the prisoner. The grounds of this objection were, that his honor had presided in the trial of Eddleman and also of McCord, and become firmly convinced that the prisoner had committed perjury in the Eddleman case, and had, on two different occasions, approached the prisoner's counsel and said to him there was no doubt about the guilt of his client, and advised him to induce his client to plead guilty, as there was no earthly chance for him to be acquitted. In a note to this ground of the motion for a new trial, the judge says: "I had presided on the Eddleman trial; also on one of the trials of McCord for perjury. I knew that McCord was tried again, found guilty, and the conviction was final. In the interest of pending justice and economy, I

wished to save another trial, which necessarily involved the evidence in the Eddleman and McCord cases, that I and the public had heard so often. Nevertheless, I had no prejudice against Hefflin, and tried him as though I had heard of the case for the first time." There can be no doubt of the scrupulous accuracy and truth of this statement. Not the least shade of a suggestion at variance with it anywhere appears in the record before us. That the trial was conducted uprightly and impartially, so far as the presiding judge was concerned, admits of no question. There is certainly no law which renders it a disqualification *per se* to try an indictment for perjury that the judge is the same who presided at the trial in which the alleged perjury was committed, and also at the trial of another witness who testified in the first case. It can make no difference that the judge had thus become convinced of Hefflin's guilt, because the opinion of the presiding judge as to the guilt or innocence of the prisoner, however that opinion may have been formed, does not unfit him for discharging his judicial duties with the most complete fairness and impartiality. These duties are exactly the same, whether the accused is guilty or innocent, and upon that question the judge has no deciding power, and is not permitted to intimate to the jury his opinion. That all his functions may be duly exercised irrespective of his own opinions is taken by the law for true; this is shown by the fact that he is required to hear all the evidence as it is delivered to the jury, and after so doing, to instruct the jury upon the law applicable to the same. It could hardly be expected that from hearing all the evidence he would not form some opinion of his own as to the actual guilt or innocence of the person on trial, but the law cares not for this, and is not so absurd as to make it work a disqualification to preside throughout the trial. If he can hear the evidence once without disqualifying himself, we see not why he might not do so twice or thrice. As to advising or urging counsel to induce his client to plead guilty, this, as we understand the record, was not done judicially or publicly, but privately and unofficially. We put this construction upon the language in the record because nothing to the contrary is stated, and we cannot gratuitously impute to any judge of the superior court, and especially to one of such high character and such a nice sense of judicial propriety, anything unbecoming the judicial station. For the judge privately and unofficially — that is, in his capacity as a mere

citizen—to advise a member of the bar to do thus and so touching a pending case, for such and such reasons, cannot be held to render him legally disqualified to preside in the case concerning which he thus volunteers to give his advice. A citizen of the commonwealth, though he may chance to occupy a seat on the bench, is not cut off from friendly personal intercourse with the members of the legal profession, and what he may chance to say to them as to how he thinks they ought to serve their clients, or as to his opinions and convictions in regard to the merits of their cases, cannot be treated as official conduct, and become matter for review and reversal by the supreme court.

2. One of the theories of the prosecution was, that Heflin and McCord had, before the trial of Eddleman, combined to commit perjury in Eddleman's behalf. As tending to prove this theory, a witness of the name of Owens was introduced, who, after explaining that he overheard an interview between McCord and Heflin, testified that in that private interview McCord said to Heflin, "If I get up on that stand and swear that Tom Gresham had a knife cutting at George Eddleman, I will have to have better security than John Hilderbrand"; that Heflin replied, "The money is all right; you will get the money"; then McCord said, "Suppose, now, that somebody gets up and swears I was not in the alley?" to which Heflin replied, "Everything was in such confusion, nobody could tell who was in the alley." The testimony of Heflin in Eddleman's case on which perjury is assigned relates in part to his own presence in the alley here spoken of. We have no doubt the evidence of Owens was admissible, as tending to show that Heflin endeavored to influence McCord to give false testimony in respect to the very same matter touching which his own alleged perjury was committed.

3. The whole *res gestæ* of the killing of Gresham by Eddleman, including declarations made at the time by each of them, might be necessary to throw light upon those particulars of the transaction to which Heflin testified on Eddleman's trial, and which are involved in the assignments of perjury. We think, therefore, that the declarations objected to (for which see the official report) were admissible.

4. The indictment in the present case alleged that Heflin, on a certain day, "in a judicial proceeding in Fulton superior court, before Richard H. Clark, judge presiding, after a lawful oath had been administered to him, and in a matter ma-

terial to the issue, the issue being in the case of the state of Georgia against George H. Eddleman, charged with the murder of Thomas G. Gresham, a plea of not guilty having been entered by the said Eddleman, which said case was being then and there tried in said superior court, and the said Heflin being then and there a witness in said case in behalf of the defendant, the said George H. Eddleman, did willfully, knowingly, absolutely, and falsely swear," etc. No record of the case here referred to was put in evidence, nor was the existence or contents of any indictment against Eddleman, or of any plea to such indictment, proved in any manner whatsoever. The official stenographer of the court testified as follows: "I recollect the trial of the case of the state against George H. Eddleman, charged with the killing of Thomas E. Gresham. I did take down the testimony, or part of the testimony, in that case. I did take down the testimony of M. R. Heflin in that case. That testimony was taken down correctly. This is a transcript of my notes of the testimony of M. R. Heflin in the case of the state against George Eddleman for murder. This is the testimony taken at the time that George Eddleman was being tried. This killing of Gresham took place in the fall of 1888; I don't remember the month. Judge Richard H. Clark presided in that case. I was present when Heflin was sworn as a witness, and when he took the stand and testified. That was in Fulton County. I could not be positive, but I think Mr. Hill administered the oath. . . . Mr. Hill was solicitor-general at the time. . . . I am not certain that he administered the oath; it may have been one of the other attorneys. . . . It may have been Judge Dorsey or Mr. Cox. . . . I recollect his being sworn to tell the truth, and nothing but the truth, in the case of the state against George Eddleman, charged with murder. . . . I am positive he was sworn. He was sworn as a witness in the case of the state against George Eddleman." This extract furnishes all the evidence which the record contains of the existence of any judicial proceeding between the state and Eddleman. Unless, by admission or otherwise, the formal proofs are waived or dispensed with, the production of the record, or of a duly authenticated transcript thereof, is, in such cases, essential. "The cause and issue wherein the perjury was committed are proved by the record, which should be in the form and with the verification required by the ordinary practice of the court": 2 Bishop's Crim. Proc., sec. 933 b. The

authorities, early and late, on this question seem to be of uniform tenor: 2 Starkie on Evidence, 859; Bull. N. P. 243; 2 Chitty's Crim. Law, 312 a; 2 Archbold's Crim. Pr. & Pl. *602; 8 Russell on Crimes, *95; 2 Roscoe's Crim. Ev. *843; 3 Jacob's Fisher's Digest, 3546 et seq.; 2 Wharton's Crim. Law, sec. 1826; 3 Greenl. Ev., sec. 197; 2 Taylor's Ev., sec. 1668. This requirement as to the medium of proof corresponds with the general rule of law, that the proceedings of a court of record are known only by means of the record itself: *Collins v. Bullard*, 57 Ga. 333; *Rutherford v. Crawford*, 53 Ga. 139; *James v. Kerby*, 29 Ga. 684.

5. There being no direct evidence of the existence, finding, or pendency of any indictment for murder against Eddleman, or of any issue raised upon such indictment, it follows from what has been said above that no proper foundation was laid for charging the jury upon such a hypothesis. The court therefore erred in the part of the charge which, as set out in full, was expressed in this language: "If you believe from the evidence that one George Eddleman was tried for murder in the superior court of Fulton County, and in that case the defendant was administered an oath by the solicitor-general, that, so far as the oath having been taken in some judicial proceeding and having been administered, the case, to that extent, the burden being upon the part of the state, would be made out." The stenographer's evidence was all appropriate to open the way to the introduction of the evidence given by Heflin on the trial of Eddleman, and for that purpose it was all admissible; but in order to show the actual existence of the case of *State v. Eddleman* as a judicial proceeding in the superior court of Fulton County, and its identity with the case described in the bill of indictment, it was necessary to go further, and prove by the record an indictment against Eddleman (for he could not have been legally tried without an indictment), and that there was an issue raised upon that indictment, and what that issue was. The bill of indictment in the present case alleges that there was a plea of not guilty, but no evidence whatever as to the plea was adduced. Consequently, the jury trying Heflin did not know by evidence either that Eddleman was indicted, or upon what issue he was tried.

6. For the same reason, it was error to charge the jury thus: "If you believe from the evidence that it was an issue upon the trial of George Eddleman whether, at the time he shot

Gresham, he (Gresham) was advancing upon him with a knife in his hand, or something like a knife, that would be a matter material to the issue." This charge assumes that there was evidence before the jury from which they could ascertain what the issue was which was made up in the trial of Eddleman, and that they could apply thereto the testimony given by Heflin upon that trial, and determine its materiality.

7. Various other special grounds are set forth in the motion for a new trial. Some of them are not fully verified by the presiding judge. Construing those which are verified in the light of the whole charge and of all the facts in the record, we think no material error, further than we have indicated, appears. But the evidence was manifestly deficient on a material element of the case, and the court having committed the errors which we have discussed, the prisoner, as a matter of strict law, is entitled to a new trial. Doubtless, it is only where such a deficiency in the proof is pointed out and insisted upon, that a reviewing court would be under the duty of having the case tried over on account of failure on the part of the state to supply the formal record evidence which the law requires. It would seem that this point was not raised in *Elder v. State*, 52 Ga. 581, and we are not aware of any case in the Georgia reports in which it has been considered. The clear law of it, however, is as we now declare it, and whether the prisoner be guilty or innocent, he cannot be punished until he is legally convicted.

Judgment reversed.

JUDGES — DISQUALIFICATIONS OF: See note to *Ex parte Harris*, 23 Am. St. Rep. 550. To the cases there cited may be added the following, in which the judge was held to be disqualified by his previous connection with the litigation: *Johnson v. State*, 29 Tex. App. 526; *State v. Burks*, 82 Tex. 584; *Cullen v. Drane*, 82 Tex. 484. On the ground of interest, a judge is disqualified to pass on the homologation of an account, when the assignee of a claim transferred by him attempts to enforce its payment by an opposition to the account; for although the claim has been transferred without recourse, yet there is an implied warranty as to the existence of the debt, and the judge is interested to that extent: *Succession of Jan*, 43 La. Ann. 924. But in a proceeding instituted by the State Bar Association to disbar an attorney, the presiding judge of the circuit is not disqualified for trying the case because he is a member of the association: *Ex parte State Bar Ass'n*, 92 Ala. 113. Nor, under a statute requiring a property interest in an action to disqualify a judge from sitting therein, will the fact that he signed a petition on the question of changing the location of a county seat disqualify him from sitting in and deciding a *mandamus* proceeding instituted by the petitioners to compel the proper officers to call an election on the question of changing such

seat: *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190. Nor will the fact that a judge is disqualified from trying a cause render him incompetent to make orders that are merely formal: *Moses v. Julian*, 45 N. H. 52; 84 Am. Dec. 114; *Littrell v. Wilcox*, 11 Mont. 77.

PERJURY — EVIDENCE. — Declarations and acts of a person, in order to be received in evidence, must be contemporaneous and connected with the principal fact; they must constitute a part of the *res gestæ*, or serve to illustrate such principal fact: *State v. Day*, 100 Mo. 243. Declarations made preparatory to a particular litigated act, which tend to illustrate and give character to the act in question, are admissible as part of the *res gestæ*: *Hinchcliffe v. Keontz*, 121 Ind. 422; 16 Am. St. Rep. 403. As to perjury generally, see extended note to *State v. Shupe*, 85 Am. Dec. 488-501.

JUDICIAL RECORDS AS EVIDENCE. — The record of a judgment is the only proper evidence of itself: *Weigley v. Matson*, 125 Ill. 64; 8 Am. St. Rep. 335.

MAY v. JONES.

[88 GEORGIA, 303.]

LIBEL — PUBLICATION OF FALSE PROTEST BY NOTARY PUBLIC. — The protest, by a notary public, of a draft for non-acceptance, before due presentment for payment, is unauthorized, and its publication is a libel, for which the notary is liable in an action by the acceptor, who alleges that the protest and its publication were falsely, fraudulently, and maliciously made, and calculated to injure him in his credit and business.

BANKS — LIABILITY FOR MALICIOUS PROTEST OF DRAFT BY NOTARY PUBLIC. — A bank is not generally liable for the negligence or misconduct of a notary public employed by it to protest negotiable paper in his official capacity. To render the bank liable as a joint tort-feasor with a notary public for negligently and maliciously procuring the latter to make a false protest of a draft, the malice of the bank in the transaction must be specially alleged and proved.

PLEADING. — **JOINT GENERAL DEMURRER** by two defendants to a declaration which sets forth a good cause of action as to either of them should be overruled.

R. J. Jordan, for the appellant.

Rosser and Carter, for the appellees.

LUMPKIN, J. May brought his action of libel against Jones and the Merchants' Bank of Atlanta for damages to his credit and standing as a business man, by reason of a certain draft being protested for non-payment by said Jones, who was a notary public, and also an employee and agent of the bank. The defendants joined in a demurrer to the declaration, on the grounds that there was no cause of action set out as for a libel; that there was no cause of action set out as for a wrongful protest; and that the bank was not liable for the acts of

Jones, under the allegations in the declaration. The judgment on this demurrer recites that the plaintiff's attorney disclaimed in open court any claim for damages for a wrongful protest, but advised the court that the declaration was intended to be a claim for damages as for a libel only; whereupon the court sustained the demurrer, and dismissed the case, because the declaration contained no legal cause of action. This is the error complained of.

1. The declaration shows that the draft was accepted by the plaintiff, payable at the Atlanta National Bank. In the course of business, after several indorsements, it came to the Merchants' Bank of Atlanta for collection. It was protested by Jones without due presentment for payment at the Atlanta National Bank. The plaintiff avers that he had no notice before the protest that the draft was at the Merchants' Bank, and as soon as he learned this fact he went there and tendered the amount of the draft, that amount being \$45.22, which was refused because it had been protested; that at the time of the protest he had several hundred dollars to his credit at the Atlanta National Bank, and the draft, if presented, would have been promptly paid by this bank; that the protest and draft were sent to the source from whence it came; and that the charges in the protest "are false, fraudulent, and malicious, and were made in reference to the plaintiff's trade, and calculated to injure him in his trade or business."

No doubt, as against Jones, a cause of action is sufficiently set out. The declaration distinctly alleges that the charges in the protest were false, fraudulent, and malicious, and made in reference to the plaintiff's trade. Without a due presentment for payment at the place designated in the acceptance, there was no legal basis for the protest. The object of the protest being to bind the indorsers, due diligence required a presentment at the place where funds were probably lodged to meet the acceptance: 1 Daniel on Negotiable Instruments, sec. 644; 2 Daniel on Negotiable Instruments, secs. 952, 955; Wood's Byles on Bills, *216, and notes. The protest being without proper foundation, false, malicious, and calculated to injure a business man's credit, its promulgation and publication constitute a libel for which the plaintiff may maintain an action: Townshend on Slander and Libel, 2, note; Newell on Defamation, 74; Odgers on Slander and Libel, *13; 13 Am. & Eng. Ency. of Law, 314. See *Williams v. Smith*, 22 Q. B. Div. 134. It matters not that the protest carries on its face

evidence of its own invalidity. Its validity would probably pass unquestioned even by those who saw the writing, on the presumption in favor of the official act. As to this presumption, see *McAndrew v. Radway*, 34 N. Y. 511. Moreover, the hurtful consequences to the acceptor's credit would not be confined to those parties immediately interested to inquire into the regularity of the protest. The news of the protest would be quickly spread to each indorser, and become a matter of common knowledge in his business circle. It would run through the complex avenues of trade beyond pursuit and correction by the true character of the protest.

The case of *Van Epps v. Jones*, 50 Ga. 238, does not conflict with this ruling, but rather sustains it. That was an action in the nature of libel against a notary for a false protest, and this court held that the declaration was demurrable, because it did not allege that the false statement was made in reference to the plaintiff's profession as an attorney at law. Here the declaration expressly charges that the statements were "made in reference to plaintiff's trade, and calculated to injure him in his trade or business."

2. But as against the Merchants' Bank no cause of action is set out. The plaintiff's theory is, that as Jones, the notary public, was also an employee and agent of the bank, "the action of defendant Jones in the matter, he acting under the authority of defendant bank, is the action of said bank." This is all the allegation touching the bank's liability. Although there is conflict in the cases, the prevailing and better holding seems to be, that a bank is not liable for the negligence or misconduct of a notary employed by it to protest negotiable paper. The reason is, that the notary is not a mere agent or servant of the bank, but is a public officer sworn to discharge his duties properly. He is under a higher control than that of a private principal. He owes duties to the public which must be the supreme law of his conduct. Consequently, when he acts in his official capacity, the bank no longer has control over him, and cannot direct how his duties shall be done. If he is guilty of misfeasance in the performance of an official act, the bank is not liable: 1 Morse on Banks and Banking, secs. 102 d, 265; Bolles on Banks and Depositors, sec. 465; 2 Am. & Eng. Ency. of Law, 113; 16 Am. & Eng. Ency. of Law, 763; note to *Allen v. Merchants' Bank*, 34 Am. Dec. 313; *Hyde v. Planters' Bank*, 17 La. 560; 36 Am. Dec. 621; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648; 40 Am. Dec. 83; *Agricultural Bank v. Com-*

mercantile Bank, 7 Smedes & M. 592; *Britton v. Nicolls*, 104 U. S. 757; *Bank v. Butler*, 41 Ohio St. 519; 52 Am. Rep. 94. That the notary is also an employee and agent of the bank does not alter the case. There is still a sharp dividing line between his duties as agent and his duties as a public officer. When his public service comes into play, his private service is for the time suspended: See *Allen v. Merchants' Bank*, 22 Wend. 215; 34 Am. Dec. 289. In some cases it seems the bank would be liable for negligence in the selection of a notary, but no such question arises in this case.

3. There is no allegation that the bank participated in the libelous protest, except the one above quoted. Doubtless, the bank could render itself liable by maliciously procuring a false protest to be made. But there is no allegation of this import, the supposed liability of the bank being rested entirely on the general authority given to the notary. According to the plaintiff's own interpretation, the action is not brought for a wrongful protest. It may be that the bank authorized the notary to act, but it cannot be inferred from this that it contemplated the perpetration of a libel. On the contrary, the bank would have a right to rely upon the faithfulness of the notary as a public officer. As it could not command him to do its bidding in his official action, it cannot be presumed that it directed him to violate the law. This is matter for distinct allegation, in which the declaration utterly fails.

4. The case stands thus: The declaration, which is good as to one defendant and bad as to the other, is jointly demurred to by both. What ought to have been the judgment on this demurrer? The general rule is, a pleading which is demurred to as a whole, if good in part, will stand, and the demurrer be overruled: *McLaren v. Steapp*, 1 Ga. 376; *Hazlehurst v. Savannah etc. R. R. Co.*, 43 Ga. 13; *Finney v. Cadwallader*, 55 Ga. 75; *East Rome Town Co. v. Nagle*, 58 Ga. 474; *Lowe v. Burke*, 79 Ga. 164. While this rule applies chiefly to the contents or subject-matter of the pleading, it extends also to parties who unite in a demurrer. Where joint defendants unite in a general demurrer to the declaration, if a cause of action is set out as to either, the demurrer must be overruled. This applies to actions *ex contractu*: *Woodbury v. Sackrider*, 2 Abb. Pr. 402; *Phillips v. Hagadon*, 12 How. Pr. 17; *Estep v. Burke*, 19 Ind. 87; *Shore v. Taylor*, 46 Ind. 345; *Wilkerson v. Rust*, 57 Ind. 172; *Webster v. Tibbits*, 19 Wis. (438), 461; *Willard v. Reas*, 26 Wis. 540; *McGonigal v. Colter*, 32 Wis.

614; *Walker v. Popper*, 2 Utah, 96; to complaint for land: *People v. Mayor etc.*, 28 Barb. 240; 17 How. Pr. 56; to an action in tort: *Dunn v. Gibson*, 9 Neb. 513. There is some authority for a different rule in equity, namely, that the demurrer may be sustained as to one defendant and overruled as to another: *Wooden v. Morris*, 3 N. J. Eq. 65; *Barstow v. Smith*, Walk. Ch. 394; 1 Daniell's Chancery Practice, 584; Story's Eq. Pl., sec. 445. These authorities rest upon the opinion of Lord Eldon in *Mayor etc. v. Levy*, 8 Ves. 403, which does not decide the point, as he held the demurrer good as to all the defendants. Lord Eldon's view is followed in a well-written opinion in *Wood v. Olney*, 7 Nev. 109, which was an action on contract. Under the code system, the rule first stated is applied also to proceedings of an equitable nature: *Eldridge v. Bell*, 12 How. Pr. 547; *Teter v. Hinders*, 19 Ind. 93; *Morback v. State*, 34 Ind. 308; *Owen v. Cooper*, 46 Ind. 524; *Eichbrecht v. Angerman*, 80 Ind. 208; *Sanders v. Farrell*, 83 Ind. 28; Pomeroy on Remedies, sec. 577. But there is no authority for sustaining such a demurrer as a whole. The court, it seems, will not, without an application for that purpose, amend or split up a joint demurrer so as to make it the separate demurrer of each defendant, and then search the declaration in turn, to find whether a cause of action is set out against each. But in order to prevail, the demurrer must be good as to all joining in it. The court need not of its own motion render two judgments upon it.

It follows that the court erred in sustaining the demurrer to the entire declaration, the same setting out a cause of action as to one defendant. In reversing the judgment, it is directed that the court below sustain the demurrer, and dismiss the case, so far as the Merchants' Bank of Atlanta is concerned, since against it no cause of action appears.

Judgment reversed, with direction.

WRONGFUL PROTEST OF COMMERCIAL PAPER. — The circumstances under review in the principal case were not materially different from those upon which the decision in *Hirshfield v. Fort Worth National Bank*, 83 Tex. 452, 29 Am. St. Rep. 660, was rendered. In the latter case, it is true, the court referred to the fact that the plaintiff had not alleged that he was a trader, but this omission was expressly waived, and the opinion is apparently intended to be read as if such an allegation had been incorporated in the pleadings, and the court were passing upon the general question in regard to a trader. It is noteworthy, moreover, that the Georgia court made no comment upon the absence of an averment of special damages, upon which the Texas court lays so much stress. It seems impossible, therefore, to avoid

the conclusion that the views of these two tribunals are diametrically opposed to each other on the proposition that a protest which, in the words of the principal case, "carries on its face notice of its invalidity" is not an actionable publication. In the note to the Texas case we gave the reasons which appeared to us to indicate that if special damages had been alleged the plaintiff would have been entitled to recover. The Georgia court, however, in following a line of argument very similar to our own, seems to have arrived at the conclusion that averment and proof of special damages are not necessary to entitle the plaintiff to a recovery. Our note was written with special reference to the limitation which the Texas court had placed upon the right of recovery in such cases, and the circumstances were not such as to call for a discussion of the more general question, whether averment and proof of special damages might not be dispensed with. But with the present case before us, we have no hesitation in saying that the liberal doctrine of the Georgia court seems to us to be more consistent with the principles according to which the practical administration of justice is regulated in modern times, than a rule which would make the recovery of the plaintiff dependent upon an averment of special damages. The act being a wrongful one, and the claim being for a certain amount of damages, why should it not be left to the jury to decide, upon the evidence introduced, how much would be a proper compensation to the plaintiff? It would, in fact, be impossible in such a case to make an allegation of special damages which would furnish a basis for adequate compensation. As the court in the principal case very truly remarks, "the hurtful consequences to the acceptor's credit would not be confined to those parties immediately interested to inquire into the regularity of the protest." Under such circumstances, it would seem to be necessary to leave the matter entirely to the jury, which, as a means of arriving at a proper conclusion, would have the state of the plaintiff's business before and after his paper had been protested, together with any other circumstances that might be deemed to bear upon the question. The difficulty of making a proper estimate would be no greater than in many other cases of tort in which the jury is called upon to assess damages.

NOTARIES, LIABILITY OF BANK FOR NEGLIGENCE OF: See notes to *Bellefleur v. Bank of United States*, 33 Am. Dec. 50; *Allen v. Merchants' Bank*, 34 Am. Dec. 313; *Hyle v. Planters' Bank*, 36 Am. Dec. 624.

MUNNERLYN v. AUGUSTA SAVINGS BANK.

[83 GEORGIA, 333.]

BANKS AND BANKING — DEPOSIT BY TRUSTEE AS AGENT. — When a trustee deposits money in a bank to his credit as agent, the bank is discharged by paying it back to the person who made the deposit, and in the absence of notice or knowledge to the contrary, has the right to assume that he will appropriate the money to its proper uses and trusts.

BANKS AND BANKING — DEPOSIT BY TRUSTEE AS AGENT — RIGHT TO RECOVER — PARTIES. — When a trustee deposits money in bank to his credit as agent, and the bank refuses to pay his check, he may sue the bank, to recover the deposit, as trustee individually, or he may join the beneficiaries in an action to recover it.

BANKS AND BANKING — DEPOSIT BY TRUSTEE AS AGENT — DEMAND, WHAT SUFFICIENT AS. — When a trustee deposits money in bank to his credit as agent, a check, drawn by him as agent, presented by the payee, and refused payment, is a sufficient demand to enable the trustee to maintain suit against the bank to recover the amount of his deposit.

BANKS AND BANKING — GENERAL DEPOSIT — STATUTE OF LIMITATIONS — DEMAND. — When a deposit in bank is general, with nothing fixing any time or terms for its repayment, the statute of limitations does not commence to run in favor of the bank until after demand and refusal to pay, provided they occur within a reasonable time, and before the right to demand the deposit has become stale.

BANKS AND BANKING — DEPOSIT BY TRUSTEE AS AGENT — CONVERSION. — A deposit of money in bank by a trustee to his credit as agent is not a conversion of the fund, although the bank may know of the existence of the trust.

BANKS AND BANKING — DEPOSIT BY TRUSTEE — PAYMENT BY BANK. — When a trustee deposits money in bank to his credit as agent, the bank is discharged by the payment of his checks, whether they designate him as trustee or not.

PLEADING — JOINDER OF PLEAS — GENERAL DEMURRER. — When a good and a bad plea are joined, both should not be stricken out on general demurrer.

ACTION by a trustee, in which he joined his two beneficiaries, to recover of a bank certain money claimed to have been deposited with it on general deposit by the trustee, as trustee and agent, for the beneficiaries, with knowledge on the part of the bank at the times of the deposit that it was trust property and subject to the check of the trustee as agent. Plaintiffs also claimed that the trustee, as agent, drew his check against such deposit in November, 1888, in favor of one Lovett, who presented the check to the bank, and it refused to pay it. The defendant demurred generally to the declaration, and interposed several pleas, sufficiently stated in the opinion. Plaintiffs moved to strike out the pleas, but the court overruled this motion, and sustained the demurrer to the declaration. Plaintiffs excepted and appealed.

Frank H. Miller, and Lovett and Davis, for the appellants.

J. R. Lamar, for the appellee.

LUMPKIN, J. 1. When money is deposited in a bank, it is immaterial, so far as the bank is concerned, in what capacity the depositor holds or owns it. The obligation of the bank is simply to keep it safely and return it to the proper person. Therefore, when a trustee deposits money in a bank to his credit as agent, the bank would be discharged by paying it back to the individual who made the deposit, and in the ab-

sence of knowledge or notice to the contrary, would have the right to assume that he would appropriate the money to its proper uses and trusts. If this individual should go in person to the bank and demand the money, it cannot be doubted that the latter could and ought to hand it to him. This being true, he could recover the money from the bank by suit, and it will make no difference that in the action brought he designates himself as trustee, nor is it of any consequence that he joins with himself therein the alleged beneficiaries of the trust. Although the latter are not necessary parties, no injury can ensue to defendant by making them actual parties to the case.

2, 3. It appearing from what has already been said that the person who actually puts money in bank is entitled to have it back upon demand, and that it is immaterial how he describes himself, there can be no doubt that a check drawn by such person as agent and presented by the payee is a sufficient demand for the amount of money called for by the check, especially when the money was credited to the depositor as agent. If payment of such check be refused, the depositor may bring suit, and as already shown, the suit may be maintained by him described as trustee.

It appears from the declaration in this case that the deposit made was a general one, and that the bank did not issue to the depositor any certificate of deposit promising a repayment of the money, or fixing any time or terms for repayment. It simply gave to the depositor written statements to the effect that his account as agent had been credited with so much money. Under these circumstances, the bank did not become liable for a repayment of the money until after demand for it by check or otherwise, and hence the statute of limitations would not commence to run in favor of the bank until after such demand and refusal to pay. We do not mean to hold that such demand could be indefinitely delayed; for under the rule laid down in the books, this might be done for such a length of time that the right to the money would become stale.

The propositions above announced are sustained, we think, by the following authorities: 2 Am. & Eng. Ency. of Law, 101; 1 Morse on Banks and Banking, sec. 322; Bolles on Banks and Depositors, sec. 360, and cases cited in each.

The court below dismissed the declaration, on the ground that, on its face, it appeared that plaintiffs' right of action was

barred by the statute of limitations. This ruling, for the reasons above stated, was erroneous.

4. That a trustee deposits money in bank to his credit as agent is not a conversion of the fund, even though the bank knew of the existence of the trust. It has the right, as already stated, to presume that the trustee will apply the money to its proper purposes under the trust. Of course, if the bank actually knew the trustee was misapplying the trust money, and aided him in so doing,—as, for instance, by endeavoring to appropriate such money to the payment of a debt incurred for his private benefit and due by him individually to the bank,—an entirely different question would be presented: *National Bank v. Insurance Co.*, 104 U. S. 54; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411.

5. Error was assigned in the bill of exceptions upon the refusal of the court to strike defendant's pleas. The pleas are numerous, but they really set up only three defenses: 1. The general issue; 2. Payment; and 3. The statute of limitations. It was not insisted that the plea of the general issue should be stricken. The other pleas allege that all the money deposited by Munnerlyn had been paid out upon his checks and by his order and direction, and a list of the checks is given. In connection with the allegations that the money had been thus paid out, it is further asserted in the pleas that all these payments had been made more than four years before the filing of the suit, and therefore the action was barred by the statute of limitations. The pleas thus intermingled these two defenses, and the motion to strike was made against them as a whole. To have granted this motion would have resulted in striking the plea of payment, which was set forth with sufficient distinctness, and constituted a complete answer to the action. We have already shown that the plea of the statute of limitations, tested in the light of the plaintiffs' allegations, was not good; but the plea of payment by the bank on Munnerlyn's checks was a valid defense. If the payment alleged therein to the person who actually made the deposit, or on his checks, is established by proof, the bank should be discharged: *City Bank of Macon v. Kent*, 57 Ga. 283. This plea of payment is not vitiated because it is thus associated with the invalid plea of the statute of limitations. A bad part in pleading does not make the whole bad, but a good part makes the whole good enough to withstand a general demurrer. The court, therefore, did not err in overruling the mo-

tion to strike the defendant's pleas: See *May v. Jones*, 88 Ga. 308; *ante*, p. 154, and cases cited. Every one of the pleas objected to contains an averment of payment to the depositor or his order, which suffices to save each one from destruction by a general motion to strike. But even if some only of the pleas are sound defenses, the others, not being singled out or selected by the movant as specific objects of attack, would stand, because found in good company.

The judgment is reversed because the court erred in dismissing the petition on the ground that the cause of action alleged therein was barred by the statute of limitations.

BANKS AND BANKING — DEPOSITS BY ONE PERSON FOR ANOTHER. — When money is deposited in bank by one person as agent for another, with nothing upon the face of the deposit account to show for whom he is agent, the money, as between the bank and the depositor, is the property of the latter: *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419; 17 Am. St. Rep. 778. Money deposited in bank by one person may be shown to belong to another, either by the latter or his attaching creditor; but in the absence of any claim by the real owner, the bank cannot dispute the title of the depositor, and is bound to honor his check: *Hemphill v. Yerkes*, 132 Pa. St. 545; 19 Am. St. Rep. 607. When an account is thus opened by a depositor as trustee, the contract of the bank is, that it will pay out the same on the checks of the depositor, and when such checks are drawn in proper form, the bank is bound to presume that they are drawn in the proper discharge of the duty of the trustee, and to honor them accordingly: *State Nat. Bank v. Reilly*, 124 Ill. 464; *Freeholders v. Newark Nat. Bank*, 48 N. J. Eq. 51. But if the principal asserts his right to the money before its repayment, and notifies the bank of his unwillingness that it shall be paid to the agent, the agent's right to reclaim it ceases: *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215.

BANKS AND BANKING — DEPOSITS. — **STATUTE OF LIMITATIONS** does not begin to run against deposit in bank until demand is made and deposit refused: *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; 80 Am. Dec. 507.

POWER OF TRUSTEE TO SUE IN HIS OWN NAME. — Trustee may reduce the trust estate to possession, and may sue or defend an action at law in regard to it, if the instrument by which the trust was created does not prohibit him from so doing: *Huckabee v. Billingsly*, 16 Ala. 414; 50 Am. Dec. 183; *Commissioners v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Harney v. Dutcher*, 15 Mo. 89; 55 Am. Dec. 131. He may maintain trover against his *certain* trust: *Guphill v. Isbell*, 1 Bail. 230; 19 Am. Dec. 675; or ejectment: *Kirkpatrick v. Clark*, 132 Ill. 342; 22 Am. St. Rep. 531.

OCEAN STEAMSHIP COMPANY v. EHRLICH.

[88 GEORGIA, 502.]

STOPPAGE IN TRANSITU — WHEN NOT DEFEATED. — When, after freight and wharfage are paid and receipted for, the bill of lading shown but not assigned, and the goods, though upon the wharf at their destination, are not actually delivered by the carrier to the consignee, the right of stoppage *in transitu* still exists, as against a *bona fide* purchaser who has paid value and has delivered the receipted freight and wharfage bills, and an order upon the carrier for the goods. In such case, if part of the goods have been delivered under such order, the right of stoppage *in transitu* still exists as to the remainder undelivered upon the wharf.

STOPPAGE IN TRANSITU — HOW DEFEATED, AND WHEN STILL EXISTS. — The right of stoppage *in transitu* can only be defeated by actual possession in the vendee, or a *bona fide* assignment of the bill of lading; and a custom of the carrier to dispense with the production of the assigned bill of lading, and to deliver the goods to the holder of the receipted bills for freight and wharfage, does not defeat the right of stoppage *in transitu*.

Lawton and Cunningham, for the appellant.

Garrard and Meldrim, for the appellees.

BLECKLEY, C. J. The right of stoppage *in transitu* was exercised by certain vendors and consignors of goods sold and consigned to Epstein and Wannbacher under the following circumstances: The goods were shipped from New York to Savannah, the carrier being the Ocean Steamship Company. They arrived and were put on the wharf of the steamship company at Savannah. The freight and wharfage had been paid, the bills therefor were receipted, and nothing remained to be done to change the actual possession from the carrier to the consignees except to remove the goods from the wharf. It was the custom of the carrier to deliver goods thus situated, upon presentation of the receipted bills for freight and wharfage, without requiring bills of lading to be produced. Epstein and Wannbacher, the consignees, sold the goods to Ehrlich and Brother, exhibiting to them the bills of lading, but executing no assignment of the same. In lieu of such assignment, they delivered to them the receipted freight and wharfage bills, together with an order upon the carrier for the goods, and Ehrlich and Brother paid the agreed purchase price. Under this order, a portion of the goods were delivered to their drayman and hauled away. Upon the following day, the drayman returned for the residue, but as to this residue the right of stoppage *in transitu* had been exercised on that morning by the consignors; and for this reason the carrier

refused to make delivery to Ehrlich and Brother. This suit, brought by Ehrlich and Brother against the carrier, is the result of such refusal.

Did the consignors stop too late, or were they in time? The provisions of the code on the subject are as follows:—

“The right of stoppage *in transitu* exists whenever the vendor, in a sale on credit, seeks to resume the possession of goods while they are in the hands of a carrier or middleman, in their transit to the vendee or consignee, on his becoming insolvent. It continues until the vendee obtains actual possession of the goods”: Sec. 2075.

“If the goods are delivered before the price is paid, the seller cannot retake because of failure to pay; but until actual receipt by the purchaser, the seller may at any time arrest them on the way, and retain them until the price is paid. If credit has been agreed to be given, but the insolvency of the purchaser is made known to the seller, he may still exercise the right of stoppage *in transitu*”: Sec. 2649.

“A *bona fide* assignee of the bill of lading of goods for a valuable consideration, and without notice that the same were unpaid for and the purchaser insolvent, will be protected in his title against the seller’s right of stoppage *in transitu*”: Sec. 2650.

Under these provisions, nothing defeats the right of stoppage but actual possession in the vendee, or *bona fide* assignment of the bill of lading. In this case, as to the goods remaining upon the wharf, there was neither. The wharf was the wharf of the carrier, and the order for delivery recognized that the goods were still in the carrier’s custody, as indeed they were; nor did a delivery of part of them operate to change the actual possession of the residue. No doubt the purchasers from Epstein and Wannbacher acquired title to the whole lot as against them, but this title was acquired as they held it, subject to the right of stoppage by the consignors. The actual possession of the goods not removed from the wharf was certainly never in Epstein and Wannbacher, and what they did not have, they could not confer on their vendees. The latter, by means of their purchase, acquired the title and the right of possession, and by means of the order of delivery they intended and expected to derive actual possession from the carrier; but this was accomplished only as to the goods not stopped. It failed of accomplishment as to those which were stopped. As the consignors were

not too late relatively to the consignees, they were not too late as to purchasers from the consignees who had not obtained actual possession. Confessedly, there was no assignment of the bills of lading. If these bills had been assigned, that would have been equivalent to an actual delivery of the goods. The law recognizes no substitute for such assignment. The parties sought to make a substitute for it by delivering the receipted bills for freight and wharfage; but as to the right of stoppage *in transitu*, neither this substitute nor any other will avail. The custom of the carrier to dispense with the production of bills of lading, and to deliver to the holders of receipted bills for freight and wharfage, can in no wise modify or qualify the right of stoppage *in transitu*. This right is regulated by law, and is terminated or defeated only in the ways which the law recognizes.

The court erred in not granting a new trial.

Judgment reversed.

STOPPAGE IN TRANSITU: See, generally, note to *Allen v. Maine Central R. R. Co.*, 1 Am. St. Rep. 312-314. Right of stoppage in transit is a right possessed by the seller to reassume the possession of goods not paid for, while on their way to the purchaser, in case he becomes insolvent before he has acquired actual possession: *Kingman v. Denison*, 84 Mich. 698; 22 Am. St. Rep. 711, and note, in which references to other notes in the series are given. The decision in the principal case apparently depends upon the wording of the Georgia code, according to which either "actual possession" or a "*bona fide* transfer of the bill of lading" was required to defeat the right of stoppage. The ordinary common-law rule is, that "transit is at an end whenever the goods, in pursuance of the original destination given them by the consignor, have come into either the actual or constructive possession of the vendee": *Sawyer v. Joslin*, 20 Vt. 172; 49 Am. Dec. 768; see especially p. 771 of the opinion. The facts of the principal case show that "constructive possession" had been taken, for all charges had been paid to the carrier, and the goods were entirely at the disposal of the consignee. The circumstances under review in *Sangslaff v. Stix*, 64 Miss. 171, 60 Am. Rep. 49, were quite similar. There S. shipped goods by railroad to R. at A. station. When the goods arrived there, R. paid the freight charges, receipted for the goods, and told the company's agent that he would leave the goods with him until they should be called for. Held, that it was then too late for S. to exercise the right of stoppage. In several cases (see *Sawyer v. Joslin*, 20 Vt. 172; 49 Am. Dec. 773) it has been decided that the transit was not at an end as long as the goods were still in the hands of the carrier, subject to the carrier's lien for freights. See, as to the same point, *Calahan v. Babcock*, 21 Ohio St. 281; 8 Am. Rep. 63; *Symms v. Schotten*, 35 Kan. 310. The necessary inference from these decisions is, that the right of stoppage would, in the opinion of the courts which delivered them, have been defeated if the charges had been paid. The essential question seems to be, whether the control of the carrier over the goods has ceased, and the transit thus ended. If the goods are so far under dominion of the buyer that he may ship them to any

person, at any time, and in any quantity, at his discretion, the delivery is complete, and the right of stoppage is ended: *Diehl v. McCormick*, 143 Pa. St. 584. The doctrine under the Georgia code seems to be that of the earlier English cases, which required a "corporal touch" to defeat the right of stoppage: See note to *Hause v. Judeon*, 4 Dana, 7; 29 Am. Dec. 302.

GREEN v. STATE.

[35 GEORGIA, 516.]

CONFESSIONS ARE NOT ADMISSIBLE IN EVIDENCE in criminal cases, when there is any reasonable ground to believe that they were induced by hope or fear.

CONFESSION AS EVIDENCE, WHEN NOT ADMISSIBLE. — A confession of crime, made by a prisoner accused, to a sheriff and a third person, who is peculiarly interested in his conviction, and which is induced by a remark made by such third person to the prisoner, that "if you know anything, it may be best for you to tell it," is not admissible in evidence, and if admitted, should, on the inducement appearing during the course of the trial, be withdrawn and excluded from the jury.

INDICTMENT and conviction of Edmund and Ansil Green for the murder of one Keener. Edmund moved for a new trial, on the ground that certain admissions and confessions made by him were not freely and voluntarily made. The testimony taken on the motion tended to show that one Arp arrested Edmund Green, and had a conversation with the prisoner, in jail, in the presence of Wilson, a sheriff. Arp testified to the conversation in the jail, in which Edmund Green said that "Ansil Green, Jake Carter, and Robert were with him at the time Keener was killed; that four shots were fired the first volley; that Keener ran off hallooing, and the other three followed him; he heard more shooting; they then came back and said they had done him up." He also said: "Now, men, I want you to understand I am not hired, and I am not scared, and I tell you this of my own free will and accord." Arp also testified that prior to the time when the prisoner made the above statement he remarked to him that "it might be best for you to tell it." Wilson testified that Edmund Green made about the same statement in jail in the presence of himself and Arp as that testified to by Arp, except that Wilson testified that the prisoner said that though he saw the shooting of Keener, he took no part in it, and that it was done by Ansil Green and the two Carters. Wilson also testified that prior to the statement made by the prisoner, Arp said

to the latter: "Now, Edmund, you understand if you tell anything, you do it voluntarily," and "Edmund, if you know anything, it may be best for you to tell it." The motion for a new trial was overruled, and the plaintiff excepted and appealed.

W. T. Day and M. J. Jerman, for the appellant.

W. A. Little, attorney-general, and George R. Brown, solicitor-general, for the state.

LUMPKIN, J. A careful and laborious examination of a large number of text-books and decisions touching the admissibility of confessions in evidence in criminal cases shows that the authorities are in considerable conflict, and that it is difficult to draw a precise line between confessions which should be received and those which should be rejected. The tendency of modern judicial opinion is to refuse to admit them when there is any reasonable ground to believe that they were induced by hope or fear. Precisely what words or conduct will constitute such inducement is not easily determined, and differences of opinion concerning the effect and meaning of many expressions, varying in language but more or less similar in import, have given rise to the conflict mentioned. We do not think it would be profitable now to review and discuss these authorities, either with the view of attempting to harmonize them, or of deducing from them a rule which could be applied to all cases. We shall content ourselves, in this case, with announcing our purpose to adhere closely to the plain mandates of our own statute as expressed in sections 3792 and 3793 of the code, and with putting the seal of our condemnation upon the practice too much indulged in by officers and *quasi* officers, such as detectives, in extorting or otherwise improperly obtaining confessions from prisoners in their custody. It is a gross and inexcusable abuse of authority on the part of men occupying official positions or assuming to act officially to thus take advantage of the helplessness or ignorance of persons charged with crime, who are, to a greater or less extent, under their control or in their power, and we deem it our duty to thus rebuke such conduct in unmistakable terms.

In the cases of *Rafe v. State*, 20 Ga. 60, and *Valentine v. State*, 77 Ga. 470, this court went as far as any court should ever go in sanctioning the admission of confessions made under the circumstances therein shown. In the former, Judge

McDonald expressly disapproved of the manner in which they were obtained, and in the latter, the point was not really before this court as to whether or not the court below properly admitted them. An examination of these cases will show that neither of them is in all respects like the case at bar. In all of them, perhaps, the real object of the conversations had with the prisoners was to obtain confessions of guilt, rather than to ascertain the truth, whatever it might be. Of this there can be no doubt in the case before us, and besides, the person accompanying the sheriff and leading in the conversation had a pecuniary interest in the prisoner's conviction, of which the sheriff was aware, and he lent his presence and assistance to the accomplishment of the other's purpose in obtaining a confession. Under these circumstances, we cannot believe that the criminating admissions made by the prisoner, following the expressions used to him as stated in the head-note, were "made voluntarily, without being induced by another, by the slightest hope of benefit or the remotest fear of injury." Indeed, it is difficult to conceive how the words spoken to him could, under any circumstances, do otherwise than create the impression or belief that if he confessed it would secure him a benefit of some kind. The error in refusing to rule out the evidence specified would require the granting of a new trial, irrespective of the question whether or not the testimony of the accomplice was sufficiently corroborative to authorize a conviction.

Judgment reversed.

ADMISSIBILITY OF CONFESSIONS: See extended note to *Daniels v. State*, 6 Am. St. Rep. 242-251. When the influence applied to obtain a confession is such as to make the prisoner believe that his condition would be bettered by making a confession, true or false, this excludes the confession: *Searcy v. State*, 28 Tex. App. 513; 19 Am. St. Rep. 851. The confession of an accused will not be regarded as voluntary, when promises have been made by the prosecutor, and the accused invites him to call the next day, and he does so, and without any invitation of the accused, renews the same promises, whereupon the accused confesses. The promises will be regarded as operating from the time the first inducements were offered to the accused: *State v. Mims*, 48 La. Ann. 532. The promise which will exclude a confession must be one made by a person in authority, who has some control over the prisoner: *State v. Sprer*, 16 Me. 293; 33 Am. Dec. 665; *Cannada v. State*, 29 Tex. App. 537. The fact that defendant's sister is also under arrest for the commission of the crime, and the confession may have been made to free her from suspicion of guilt, will not render incompetent a confession which has been freely and voluntarily made: *People v. Smalling*, 94 Cal. 112. Nor will a declaration made by one charged with a criminal offense, to the officer who then has him in

custody and handcuffed, be thereby rendered incompetent as evidence: *State v. Whitfield*, 109 N. C. 876. The preliminary examination of the defendant, for the purpose of ascertaining whether the confession was voluntary, must, if it is so desired by him, be made by the court outside of the hearing of the jury, and it is within the exclusive province of the court to determine whether the confession is voluntary, and not a question for the jury, even though the evidence on such point is conflicting. If there is a reasonable doubt against its being free and voluntary, it should be excluded from the jury: *Ellis v. State*, 65 Miss. 44; 7 Am. St. Rep. 634. On the other hand, it was held in *Shepherd v. State*, 31 Neb. 389, that the preliminary examination should be conducted in the hearing of the jury. After the confession is admitted, it is for the jury exclusively to decide what credit it should receive: See the cases just cited.

MILLER v. GEORGIA RAILROAD AND BANKING CO.

[68 GEORGIA, 562.]

COMMON CARRIER MAY ADOPT AND ENFORCE ANY REASONABLE REGULATION as between itself and its customers for the conduct of its business, the effect of which is the protection of the carrier and the benefit of the public.

COMMON CARRIERS — REGULATIONS AS TO STORAGE IN CARS. — When the customers of a carrier by railway have the privilege of unloading cars in which their freight is shipped, the carrier may adopt and enforce a reasonable regulation as to the time within which the cars may be unloaded by customers without any storage charges, and fix a reasonable rate of storage per day to be charged for the use of the cars so long as they remain unloaded beyond the time fixed by the regulation for free storage.

COMMON CARRIERS — REGULATION AS TO STORAGE IN CARS — WHEN REASONABLE. — A regulation made by a railway company, by which it charges freight storage on each car at the rate of one dollar per day for every day that the car remains unloaded, after a reasonable and fixed time is given in which to unload it free of charges for storage, is not rendered unreasonable because cars are of different sizes and capacity, nor because fractions of a day are charged for as a whole day, nor because the rate of storage in warehouses and elevators is less. On the contrary, such regulation is reasonable and valid.

COMMON CARRIERS — REGULATIONS — ADOPTION OF. — A common carrier, though a corporation, makes a regulation its own by adopting and acting upon it, irrespective of the source whence it is derived, and the fact that it was promulgated by a person or board of persons representing a combination of carriers does not impair its effect as a regulation of the carrier adopting it.

COMMON CARRIERS — REGULATIONS — HOW AFFECT SHIPPERS WITH NOTICE. — As between a carrier and its customers who have notice of its regulations before shipments are made, the presumption is, that the parties contracted with reference to such regulations, and they are operative, whether indicated upon bills of lading or not, and whether the ship-

ments are made to the order of the consignor, with the customary direction to notify the customer, or directly to the customer himself.

COMMON CARRIERS — REGULATION FOR UNLOADING FREIGHT-CARS — CONSTRUCTION. — In construing a regulation of a common carrier for unloading freight-cars, and providing that the cars are to be placed and remain accessible to the consignee for the purpose of unloading, the course and exigencies of business are necessarily to be regarded; hence the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible, if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the consignee is ready to unload.

ACTION to recover the sum of \$892, with interest. The instructions asked by the defendant, which were refused by the court and mentioned in the opinion, are as follows: —

“(a) Plaintiff cannot by rule fix upon any rate of storage or demurrage unless it is reasonable, and in arriving at what would be a reasonable charge, the jury are permitted to examine what are the customary charges for the storage of grain.

“(b) In the absence of an express contract or a stipulation for demurrage charges in the bill of lading, the consignee is not liable for demurrage.

“(c) Before the plaintiff could recover demurrage for the use of the cars, it would have to prove that the detention prevented its making profits by the use of the cars. The plaintiff must show a loss of service of the cars and the amount of damage by detention, in order to recover for demurrage.

“(d) Under the charter of the plaintiff, it is not authorized to make charges for storage, except by rules established by the board of directors; and if you find that the rule under which the plaintiff makes the charge for storage or demurrage in this case was adopted and promulgated by any association or person other than the board of directors of the plaintiff, the same is illegal, and does not entitle plaintiff to make any charge for storage or demurrage. [Plaintiff read the twelfth section of its charter (act of 1833), authorizing it to charge for storage and to fix reasonable rates; defendants relied on section 1 of the act of 1835, claiming that such rules could only be promulgated by the directors, and that the evidence disclosed that the rule was established and published by the Southern Railway and Steamship Association, of which the plaintiff was a member, and was therefore invalid and illegal, as contravening both the charter and the general law.]

“(e) If the jury believe that the known, certain, general,

and universal custom and practice of plaintiff and common carriers in the state and county prior to November, 1889, was not to charge either for storage in cars on the tracks or for demurrage in car or cars, then that custom becomes binding on carriers, shippers, and consignees, and could not be changed by a mere notice on the part of the carrier to the consignee that demurrage would be charged.

“(f) As a matter of law, the plaintiff is not entitled to charge for demurrage on cars remaining loaded on its tracks. If the plaintiff desired the use of the cars, or to return those containing the grain, it was at liberty to unload the grain into its warehouse, or the warehouse of a third person, or into the elevator, and if it failed to do so, it cannot make defendants liable for the detention of cars. Plaintiff, by the exercise of its legal rights, could have unloaded the cars, charged and collected storage, and avoided the detention of the cars, and if it failed so to do, it cannot thereby render defendants liable for demurrage charge.

“(g) Demurrage in law is limited to the charges for the detention of ships. Railroad companies are not allowed to charge therefor.

“(h) The freight charges of a railroad include all usual expenses and charges for the goods from the time they are shipped until the relation of common carrier ceases by the delivery or actual storage of the goods. As long as the goods are left in the cars, they are not stored, but the plaintiff holds them as common carrier.

“(i) Grain and ponderous articles may be delivered without being unloaded actually, but the relation of common carrier of grain in bulk continues until the goods are actually unloaded and stored, or until the car is placed at the usual place of delivery, or at a point accessible to the consignee where they can conveniently unload.

“(j) If the jury find from the evidence that forty-eight hours after the notice was served, any or all of the cars mentioned were in the depot-yard of plaintiff, at a point at which they were inaccessible to defendants, and thereafter they paid the freight, and subsequently to the payment of the freight, the cars had to be hauled or carried by plaintiff from the yard to the usual point where the cars were delivered to the defendants, then I charge you the relation of common carrier continued up to the time when the cars were carried to the point of delivery; and the plaintiff is not entitled to recover

either storage or demurrage for the time prior to the placing of cars at such a point. Nor would it be entitled to charge for the detention or use of the cars until a reasonable time for unloading had elapsed after the car had been placed at such a point.

“(k) So long as the cars containing the grain have to be moved by the railroad company, or hauled or carried from one place to another, so as to be delivered to defendants, the relation of common carrier exists, and the railroad company has not become a warehouseman as to the goods therein, and cannot charge for storage or for demurrage on the cars.”

The parts of the charge of the court assigned as error are:—

“A regulation of the railroad company, that such freights, in bulk or otherwise, as to which it is the custom for cars to be unloaded by the owners of the property, shall be charged one dollar per car for each day such car is not unloaded, at the expiration of forty-eight hours, which forty-eight hours shall commence at ten o'clock, A. M., of the day after notice of the arrival of the car is given to the owner of the property, is a reasonable regulation, and binding upon the customers of the railroad company who have notice of the same.

“If the jury shall find that it was a regulation of the railroad company at the time to charge for storage or demurrage at the rate of one dollar per day for each car, when freight like the defendants' was not unloaded in forty-eight hours after the commencement of the notice to the defendants, and if the jury shall find that the plaintiff gave the defendants notice of such regulation, and of the arrival of the cars containing defendants' freight, then the defendants are bound thereby, and the plaintiff is entitled to recover in this action at the rate of one dollar per day for each car which plaintiff shows to you was covered by the regulation.

“I charge you that the rule and regulation was a valid one, that it was reasonable, and that if the railroad complied with its part of it by delivery at a point accessible to the consignee, or if it substantially complied, or what might be termed constructively complied, by notifying the consignee that the goods had arrived, and that it actually had them in position for prompt delivery, and that the defendants delayed complying with that rule, then they would be liable for the charges.”

Joseph R. Lamar, for the appellant.

Joseph B. Cumming, for the appellee.

SIMMONS, J. The Georgia Railroad Company sued Miller & Co. for the sum of \$892, besides interest, the declaration containing two counts, as follows:—

1. "On the 1st of January, 1890, and on various days thereafter up to the time of filing this complaint, petitioner stored on its tracks in said county certain car-loads of corn, wheat, grain, and other produce, at the special instance and request of said Miller & Co., by means whereof said Miller & Co. became indebted to your petitioner for said storage at the rate of one dollar per day for each and every of said car-loads, amounting to the aforesaid sum of \$892."

2. "Your petitioner further shows that said Miller & Co. is further indebted to your petitioner in the sum of \$892, besides interest, for that heretofore, to wit, before the first day of January, 1890, your petitioner, who is a common carrier of goods and merchandise, made and put in operation a reasonable rule or regulation for the conduct of its business, of which rule or regulation said Miller & Co. had notice, by virtue of which said Miller & Co. became liable to pay your petitioner the sum of one dollar for every day, commencing forty-eight hours after notice of arrival, on each and every car-load of property stored by your petitioner on its tracks or elsewhere. Your petitioner shows that after said first day of January, 1890, and up to the time of filing this complaint, your petitioner has so stored a large number of car-loads of property, a schedule of which is hereunto annexed, by means whereof said Miller & Co. have become indebted to your petitioner in the sum of \$892, besides interest. Your petitioner shows that said Miller & Co. fail and refuse to pay said sum," etc.

The rule or regulation here referred to is as follows:—

"DEMURRAGE RULES.

"Concerning loaded cars to be unloaded by consignees.

"Bulk-meats, bulk-grain, hay, cotton-seed, lumber, lime, coal, coke, sand, brick, stone, wood, and such other freights, in bulk or otherwise, as it may be a stipulation of the rates thereupon, or contract for the transportation thereof, or where it is the custom for the cars to be loaded and unloaded by the owners of the property, which is not unloaded from the cars containing it in forty-eight hours, not including Sundays or legal holidays, computed from ten o'clock, A. M., of the day following the day of arrival, shall be subjected thereafter to a charge for demurrage of one dollar for each day or fraction of

a day that said car or cars remain loaded in the possession of the company, by whom to be delivered as the last carrier at interest; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period of such demurrage charge commences, they are to remain accessible to the consignee for unloading purposes."

The jury found in favor of the plaintiff, and the defendants made a motion for a new trial, which was overruled, and they excepted. Without undertaking to discuss separately and in their order the numerous grounds of the motion, it is sufficient to say, that in addition to the general objections that the verdict is contrary to law and the evidence, they complain, in substance, as follows: 1. That as matter of law a railroad company is not entitled to charge "demurrage," or storage on cars remaining unloaded on its tracks, and hence the rule in question is invalid, and the defendants are not subject to the charges recovered; 2. That the charge fixed by this rule is unreasonable; 3. That the rule was not promulgated by the proper authority, but emanated from a combination of persons other than the board of directors of the Georgia railroad; 4. That the regulation is inoperative, because not indicated upon the bills of lading; 5. That the cars were not accessible during the whole period for which demurrage was charged.

1. It is the undoubted right of a common carrier to adopt and enforce, as between itself and its customers, any reasonable regulation for the conduct of its business, the purpose and effect of which is the protection of the carrier and the benefit of the public. The rule in question, we think, falls clearly within the scope of this power. It seeks to prevent the diversion and detention of cars from the legitimate work of transportation, as well as to secure compensation for service not otherwise paid for, by prescribing, in cases where, by contract or custom, the carrier is under no duty to unload the cars, but they are to be unloaded by the customer, a rate *per diem*, in the nature of a charge for storage, to begin at a certain time after the cars have been delivered to the customer or placed at his disposal for unloading. Such a regulation cannot be regarded as unreasonable, so long as a reasonable time is allowed for unloading, and so long as the charge for the use of the cars beyond that time is not excessive. The law compels the carrier to receive the goods of the public and

to transport and deliver them within a reasonable time: Code, sec. 2029; 2 Am. & Eng. Ency. of Law, tit. Carriers, p. 787. To do this it is necessary that the means of transportation shall be under the carrier's control, and that after the duty of carriage has been performed, its vehicles shall not be converted into storehouses, at the will of consignees, to remain such indefinitely and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers, thus hampered in their facilities, and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic or perform with dispatch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities, as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks, and the obstruction, in a greater or less degree, of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general, and the people at large, must suffer seriously from this hindrance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual or class of individuals, and the business of the common carrier must be so conducted as to subserve the general interest and convenience. Especially is this true as to railroad companies, in view of the important franchises granted them by the public, and the use and control thus acquired of highways upon which the commerce of the country is so largely dependent.

The need of regulations of the kind in question is well illustrated by the evidence in this case. The general manager of the plaintiff testified that before this rule was adopted consignees were often dilatory in removing freight from the cars in which it was shipped, and "the cars were detained day after day, and days lengthened into weeks, until our transportation work was subjected to immeasurable embarrassment; the transportation of the company was wellnigh paralyzed, — not for lack of cars, for we had plenty, but because our cars were converted into warehouses. The trouble grew and finally culminated in a threatened blockage

throughout the country. It has been a part of our experience to be threatened with suit by the shipper for not moving the freight promptly. We are supposed to always have cars ready to transport any freight that is offered; we endeavor to make proper arrangements to do so; but the trouble was, that when A had freight to ship, B had our cars, and we could not get them."

It was contended by counsel for the plaintiff in error that the railroad company could unload the cars into a warehouse or elevator, and thus avoid detention. On the other hand, counsel for the railroad company contended that in the cases provided for by this rule, — that is, where it is a stipulation of the rates or contract for transportation, or is the custom, for the cars to be loaded and unloaded by the owners of the property, — it would be a breach of contract if the company were to unload, which would subject it to at least nominal damages. We do not think it material, as affecting the right to make a charge of this character, that the goods remain in cars, instead of being put into a warehouse. It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them: *Hutchinson on Carriers*, sec. 378; *Southwestern R. R. Co. v. Felder*, 46 Ga. 433. And we think where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may in many cases be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the customer's expense. And if a customer whose duty it is

to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded, in his service and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage, and to deny the right to any compensation at all for this service, on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service.

It was contended by counsel for the plaintiff in error that "demurrage," which is the designation given to this charge by the rule in question, is allowed only in maritime law, and cannot be demanded by a railroad company, in the absence of a stipulation therefor in the bill of lading. And in support of this view the cases of *Chicago etc. R'y Co. v. Jenkins*, 103 Ill. 588, and *Burlington etc. R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 891, are cited. In the former of these cases it is said: "The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not; and it is seen that these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers." The decision in the Nebraska case does not go into any discussion of the question, but merely cites and follows the holding of the Illinois court. In our opinion, the reasoning above quoted is inconclusive. We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles, as well as carriers by sea. What we have already said we think is a sufficient answer to the reason assigned, that railroads have warehouses in which to store freights. And the reason

that "railroads discharge cargoes carried by them," and "carriers by ship do not, but it is done by the consignee," of course cannot operate as to the cases provided for by this rule, which by its terms applies only where the unloading is to be done by the owners of the property. Nor is it settled that the right to demurrage in maritime law exists only by express contract. In this country the courts have repeatedly declined to follow the rulings of the English common-law courts on this subject, and have held that the ship-owner has a lien upon the cargo for demurrage, notwithstanding the absence of any stipulation therefor in the bill of lading: 5 Am. & Eng. Ency. of Law, tit. Demurrage, p. 546; Porter on Bills of Lading, sec. 356. See also *Huntley v. Dows*, 55 Barb. 310, and *Hawgood v. 1310 Tons of Coal*, 21 Fed. Rep. 681, and cases there cited.

But we are not controlled by the principles which govern as to demurrage under the maritime law. The adoption by the railroad company of the term "demurrage" as a designation for this charge does not require us to resort to that law as a standard for testing the validity of the rule. We are to look to the real substance and effect of the rule, rather than to analogies suggested by the technical designation which the carrier in this instance has seen fit to adopt. To hold that because the conditions of carriage by sea are different, no charge under this name can be enforced by a carrier by land, or that, if allowed, it must be governed by the rules of the marine law, would be to adopt a narrow and merely technical view, ignoring well-recognized grounds of public policy and the right of the carrier to prescribe reasonable rules and regulations for its own safety and the benefit of the public. The instances are few in which regulations similar to the one in question have been passed upon by the courts. The only cases we have found in which the right of a railroad company to make a charge of this kind is denied are the ones above referred to. On the other hand, the right is sustained by the supreme court of Massachusetts: *Miller v. Mansfield*, 112 Mass. 260. See also a full and able discussion of the question by Toney, J., of the law and equity court of Louisville, Kentucky, in a decision which has appeared since the judgment in the present case was announced: *Kentucky Wagon Mfg. Co. v. Louisville etc. R. R. Co.*, 11 Railway and Corporation Law Journal, 49.

2. We cannot, as matter of law, say that the rate of one dollar per day for each car is unreasonable. It is not necessarily

unreasonable because the cars vary in capacity, nor because a part of a day is charged for as a whole day. Nor can we hold that the customary rates for storage in warehouses and elevators must be the measure of compensation where the storage is in cars on the tracks of a railroad. Indeed, if it be a legitimate object of this rule to prevent the diversion of cars from the work of carriage, it would seem but proper that the charge for their use, when detained as a means of storage, should not be such as to encourage customers to adopt that means instead of the more regular and usual methods. Moreover, there was no evidence to show that the rate fixed by this rule was higher than those customary for storage of other kinds. On the contrary, there was evidence tending to show that storage in a car, at the rate fixed by the rule, might be much less expensive than storage elsewhere, the general manager of the railroad company testifying that the modern car carries from 50,000 to 60,000 pounds, and that storage in the company's depot of a car-load of 50,000 pounds would amount to \$1.25 per day. He testified further: "The rate of one dollar per day does not compensate us for the detention of the cars, and it was simply to induce the shipper to unload that the rule was passed."

3. That the rule was promulgated by a person or board of persons representing a combination of carriers did not impair its effect as a regulation of this particular company. A common carrier, though a corporation, makes a regulation its own by adopting it and acting upon it, irrespective of the source from whence it is derived.

4. Where a regulation of this character is known to the customer before the contract for transportation is made, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted with reference to it: *Miller v. Mansfield*, 112 Mass. 260; and it is operative, whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor with the customary direction to notify the customer, or directly to the customer himself.

5. The plaintiff's mode of delivery of the cars to the defendants was to place them on a certain track "designated as belonging to the Augusta and Summerville railroad," and known as "track 38," from which point they went "into the possession of the Central railroad," upon whose side-track, in another part of the city, the defendants' place of business was situated. Cars were not delivered on track 38 until the freight

was paid and the bill of lading surrendered. Until then they were inaccessible for unloading, being kept elsewhere in the plaintiff's yard. After payment of the freight, the defendant could at any time have his cars moved where they would be accessible, but sometimes it would take from one to five hours after the freight was paid before they could be placed at the point of delivery. It was contended that the time thus required for placing the cars in position should not be included in computing the time which should run against the defendants under the rule in question, the rule containing this language, to wit: "It being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that when the period of such demurrage charge commences, they are to remain accessible to the consignee for unloading purposes." Certain instructions of the court on this subject, and the refusal to charge thereon as requested by the defendants, were the basis of several assignments of error, which will be found set out in the reporter's statement. Taking the whole charge in connection with the evidence, we think the law applicable to this part of the case was fairly presented. The court, having instructed the jury, in substance, that if the defendants had notice of this rule or regulation, and the goods were shipped under a contract that they were to be unloaded by the consignees, and the plaintiff notified the consignees of the arrival of the car and of its readiness to deliver the goods, and the consignees did not receive and unload them within the time stipulated by the rule, the defendants would be liable for the charge fixed by the rule for the detention of cars, added the following: "The railroad will have complied with that rule and regulation if you find from the testimony that it placed these cars at a point where they were accessible to the consignees, and allowed them to remain there during the time fixed by the railroad when they would be free from demurrage, or where it gave notice that it was ready to place them in such position. The mere giving notice, if there was evidence that it was not ready to place them in that position, would not avail; but if you find that the cars were in a position where they could be placed in an accessible place, and the road offered to place them, by sending notice that it was ready, then that would be a substantial compliance with the rule and regulation. But if the consignees elected to delay and not receive them, they would be liable for the charges

under the rule." Also: "If you are satisfied from the testimony that the cars, up to the time of actual delivery or taking possession, were inaccessible, that the railroad could not comply with its offer, and that the delay was not the fault of the defendants, then no demurrage under this rule could be enforced, and your verdict would be for the defendants." We think the instructions complained of, as to substantial compliance with the rule, read in connection with the instructions above quoted, give a reasonable and proper interpretation of that part of the rule which relates to delivery at a point accessible to the consignee. In construing its phraseology, the course and exigencies of business are necessarily to be regarded; and hence the cars after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the customer is ready to unload. There is no evidence in the record that the cars were not at all times accessible, in this sense, or that there was any undue or unnecessary delay in placing them in position for unloading after notice from the defendants that they were ready to receive them.

6. The evidence is sufficient to uphold the verdict.

Judgment affirmed.

CARRIERS. — A delivery of goods at the place designated is necessary to relieve a carrier as such, and if, after the consignee receives due notice, he refuses or neglects to remove them, the carrier may relieve himself from liability by placing them in a warehouse for account of the consignee: *Schen v. Benedict*, 116 N. Y. 510; 15 Am. St. Rep. 426, and note with cases collected discussing this subject; *Mobile etc. R. R. Co. v. Prewitt*, 46 Ala. 63; 7 Am. Rep. 586, and note; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349, and note. Common carriers are bound to keep goods a reasonable time after notice to the consignee, if they must notify him: *Farmers' etc. Bank v. Champlain Transp. Co.*, 23 Vt. 186; 56 Am. Dec. 68, and note. See case of *Miller v. Mansfield*, 112 Mass. 260, cited in the opinion, where demurrage was allowed a carrier, when the consignee did not remove freight within a certain designated time.

CHAPMAN v. WESTERN UNION TELEGRAPH CO.

[88 GEORGIA, 703.]

DAMAGES FOR MENTAL SUFFERING alone cannot be recovered in any case.

TELEGRAPH COMPANIES — LIABILITY FOR DAMAGES FOR MENTAL SUFFERING. — A person to whom a telegraphic message is sent announcing the dying condition of his brother, but by the gross negligence of the company not delivered with due promptness, so that he is unable to reach the bedside of his brother until after the death of the latter, cannot recover substantial damages for mental suffering alone, caused by the company's failure of duty.

Hardeman, Davis, and Turner, for the appellant.

Gustin, Guerry, and Hall, for the appellee.

LUMPKIN, J. The exact question, briefly stated, is, whether a person to whom a telegraphic message announcing the dying condition of a brother was sent, but by gross negligence of the company was not delivered with due promptness, so that he was unable to reach the brother's bedside before death transpired, can recover substantial damages for the mental suffering caused by the company's failure of duty. The plaintiff does not claim to have sustained any pecuniary loss, but seeks recompense for the mental anguish due to losing the opportunity of being with his brother in his last hours.

The question has not been ruled on by this court. The expressions used in *Cooper v. Mullins*, 30 Ga. 152, do not cover it, because that was a case of physical injury. But there is no lack of authority in other jurisdictions. The trouble lies in the directly opposite views of the several learned courts which have passed upon the question. Consequently, the two conflicting lines of decision may be compared to ascertain which is the more consonant with long-established and well-recognized principles. The supreme court of Texas, in 1881, held that damages are recoverable for such an injury: *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805. No direct authority is cited for this ruling, but the court adopts as law a bare suggestion made by the text-writers Shearman and Redfield, in their work on negligence, vol. 2, sec. 756. The cases referred to in the opinion were actions for physical injuries, of which the mental agony forms an inseparable component. But the decision is followed, with more or less restriction, by the same court in numerous later cases: *Gulf etc. R'y Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 269; 59 Tex. 563; 46 Am. Rep. 278; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580;

59 Am. Rep. 623; *Loper v. Western Union Tel. Co.*, 70 Tex. 689; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; *Western Union Tel. Co. v. Adams*, 75 Tex. 533; 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Feegies*, 75 Tex. 537; *Western Union Tel. Co. v. Moore*, 76 Tex. 66; 18 Am. St. Rep. 25; *Gulf etc. Tel. Co. v. Richardson*, 79 Tex. 649; *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; *Western Union Tel. Co. v. Jones*, 81 Tex. 271; *Erie Tel. etc. Co. v. Grimes*, 82 Tex. 89; *Potts v. Western Union Tel. Co.*, 82 Tex. 545. This doctrine has involved the court in some inconsistencies, as shown by the opinion in *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, and by Judge Thompson's article on this subject in 33 Cent. L. J. 5. Compare cases of *Stuart*, *Adams*, *Feegles*, *Moore*, *Rosentreter*, and *Potts*, *supra*, with those of *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; 18 Am. St. Rep. 37; *Western Union Tel. Co. v. Brown*, 71 Tex. 723; and *Rowell v. Western Union Tel. Co.*, 75 Tex. 28. Nevertheless the Texas doctrine has gotten a strong following in other courts: *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181 (U. S. C. C. Tex.); *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; *Young v. Western Union Tel. Co.*, 107 N. C. 370; 22 Am. St. Rep. 883; see *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148; *Reese v. Western Union Tel. Co.*, 123 Ind. 294; Thompson on Electricity, secs. 378 et seq. The Alabama and Indiana courts have gone no further than holding that the sender of the message can recover for mental suffering. In Illinois it was cautiously held that nominal damages, "at least," might be recovered: *Logan v. Western Union Tel. Co.*, 84 Ill. 468. These rulings involve various perplexing questions on which they do not all agree. Whether the person to whom the message is sent, as well as the sender, can recover; whether the action is grounded in contract or in tort; whether the violation of a contract involving feeling is a proper basis for awarding substantial damages for injury to feelings alone; to what extent the message must show on its face the family relationship; whether the damages to be given are in their nature punitive or compensatory, — these are the chief problems encountered, and solved

in variant ways. Some of the cases rest on breach of contract, of which some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation: Cases of Henderson, Richardson, Levy, Chapman, and others. This view grapples with the big question, How can one, in an action for breach of contract, recover for mere disappointment or anguish of mind resulting from the breach? See *Walsh v. Chicago etc. R'y Co.*, 42 Wis. 23; 24 Am. Rep. 376. The answer given is, that the subject-matter of the contract is feeling, and the damage to feeling by non-compliance was plainly in contemplation of the parties making the contract. The breach of many a contract which the injured party desires performed brings disappointment and blasted hopes. Yet these mental consequences, if unattended with other loss, have not usually been regarded ground of recovery. The stronger view is, that the recovery, whether by sender or sendee, is had for the tort, or breach of common-law or statutory duty, the contract serving merely to create the relation of duty between the parties: Cases of Young, Reese, Stuart, Wadsworth, and others. The difficulty arising here is, whether, as there is no tort independently of the contract, the contract can rightly be treated as not precluding recovery in tort, and the telegraph company be dealt with, in this respect, like a common carrier. A tendency is observed to escape this difficulty by applying the code provisions which abolish the distinction between contract and tort, and allow the plaintiff to recover on a simple statement of the facts of his case: Stuart and Wadsworth cases. In this state no such abolition has been effected. Regarding the nature of the damages, the majority opinion in this class of decisions is, that they are strictly compensatory, and take on the vindictive or exemplary feature only in cases where the injury is willful, wanton, or malicious.

As against the above authorities, there are strong decisions denying the right of substantial recovery altogether: *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; *Russell v. Western Union Tel. Co.*, 3 Dak. 315; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300; *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554 (U. S. C. C. Ga.); *Crawson v. Western Union Tel. Co.*, 47 Fed. Rep. 544 (U. S. C. C. Ark.); and see able dissenting opinion of Lurton, J., in Wadsworth case, *supra*. This seems to us the sounder view of the law. It is remarkable that the opinions declaring in favor of recovery can point to no positive authority older than

the first Texas decision, in 1881. They do refer to certain classes of cases where mental suffering is admitted as an element to be considered by the jury in making their estimate of the damages, namely, actions for slander or libel, for seduction, for assault without physical injury, for breach of promise of marriage, and for physical injuries. But in every one of these it has been maintained that there is a necessary and inseparable ingredient of pecuniary injury: See *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300. In slander and libel, where the action is founded on words not actionable *per se*, there must be proof of special damage. And where the words are actionable *per se*, they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damage to his social influence and business efficiency. Besides, malice (express or implied) is an essential element in such cases. In seduction, it has been necessary from ancient times for the plaintiff to prove a loss of services, or a relation from which such loss might occur, else the action could not be maintained. Thus a brother, not standing *in loco parentis*, however great his anguish, and however keenly he may have felt the disgrace and mortification caused by the wrong-doer, could not recover for his mental suffering. In actions for technical assault, where no physical injury was inflicted or battery committed, damages are said by some of these authorities to be given wholly for mental suffering. Yet it may be that, the injury being essentially willful, substantial damages are given by way of punishing or making an example of the wrong-doer. An assault is an active threat against the body, an offer of violence endangering the person, which the law redresses even in its initial stage, thus protecting the physical person more completely. In actions for breach of promise, the plaintiff's financial loss plays a conspicuous part. Evidence showing the defendant's station and reputed wealth is admissible. At common law, the husband, on marriage, assumed the wife's debts and responsibility for her torts, and for support appropriate to their station. He took a large share of her property by that event, and she acquired some rights in his property. This suffices to show that the breach of marriage promise involved important pecuniary consequences. In actions for physical injuries, the great consideration is the loss of time, and the diminution of capacity for work, of course allowing also for the pain endured. So far as mental suffering originating in physical injury is

concerned, it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguished as mental and another as physical. So in cases of physical injury, the mental suffering is taken into view. But according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered: *Johnson v. Wells*, 6 Nev. 224; 3 Am. Rep. 245; *Indianapolis etc. R. R. Co. v. Stables*, 62 Ill. 313; *Joch v. Dankwardt*, 85 Ill. 331; *Keyes v. Minneapolis etc. Ry Co.*, 36 Minn. 290; *City of Salina v. Trosper*, 27 Kan. 544; 1 Sedgwick on Damages, sec. 44; *Trigg v. St. Louis etc. R. R. Co.*, 74 Mo. 147; 41 Am. Rep. 305; *Dorrah v. Illinois Cent. R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629. In an action for wrongful attachment, on the ground that the defendant was about to dispose of his property with intent to defraud his creditors, it was held that the mortification was a part of the actual damage: *Byrne v. Gardner*, 33 La. Ann. 6. This was decided by three judges, one of the five being absent and another disqualified, no authority being cited save Sedgwick and the Louisiana code. Of course, it was a case of serious injury to the plaintiff's business standing, and therefore, even if sound, is no authority on the present question. In an action for false imprisonment, or for malicious arrest and prosecution, mental anguish has been held a proper subject for compensatory damages: *Fisher v. Hamilton*, 49 Ind. 341; *Stewart v. Maddox*, 63 Ind. 51; *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449. Of course, such injuries are essentially willful, and besides, are violations of the great right of personal security or personal liberty. Reference has been made also to cases of passengers being put off railway trains, when the mortification, insult, and wounded feelings come in to enhance the damages. From the moment the passenger is ordered to get off, he is under duress; his body is not free to remain where he chooses, and where it has the right to be. It is like an illegal arrest or an illegal imprisonment. In all these cases where personal security or personal liberty is infringed, the mental suffering seems to be a necessary component in the injury. But conceding to the fullest extent that mental suffering enters as an item of damage or is the *gravamen* of damage in certain cases, it hardly admits of discussion to show that any deduction from them which would sanction a recovery in the present case for mental suffering alone would

authorize a like recovery in every case attended with mental suffering. But this would be an unwarrantable extension of them; they stand each on its own ground, in well-defined limits.

In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Wensleydale expressed the opinion that where the only injury is to the feelings, the law does not pretend to give redress. Though Mr. Sedgwick (Measure of Damages, secs. 43 et seq.) seeks to restrict this language to the case then before the court, and disputes its accuracy as a general proposition, it may be questioned whether the learned author is able to cite a single case sustaining his contention. He does refer to a number of cases, but in all of them the mental pain may be viewed as an accompaniment or part only of some substantial injury entitling the party to compensation. But even in cases where a recovery must be had on other grounds, it is frequently held incompetent to give damages for the accompanying mental injury. Thus where a father sues for a grievous physical injury to his minor child, he cannot recover for the laceration of his parental feelings, even in conjunction with damages for the loss of service, though his mental suffering be necessarily severe and heart-rending: *Flemington v. Smithers*, 2 Car. & P. 292; *Black v. Carrollton R. R. Co.*, 10 La. Ann. 33; 63 Am. Dec. 586; *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. St. 372; *Oakland R'y Co. v. Fielding*, 48 Pa. St. 320. Statutes have been passed giving recovery for homicide against the slayer; but the policy has invariably been to confine the right of action to a party sustaining pecuniary loss. And in actions on such statutes, even by the widow of the deceased, grief and anguish cannot come in for compensation: 2 Sedgwick on Damages, sec. 573, and cases cited; Field on Damages, sec. 630, and cases cited; *Gillard v. Lancashire R'y Co.*, 12 L. T. 856; *Blake v. Midland R'y Co.*, 10 Eng. L. & Eq. 437; 18 Q. B. 93; 21 L. J. Q. B. 223; *Louisville etc. R. R. Co. v. Orr*, 91 Ala. 548; *Killian v. Augusta etc. R. R. Co.*, 79 Ga. 234; 11 Am. St. Rep. 410. Where an action was brought for injury to real estate by blasting, it was held that the plaintiff could not recover for mental anxiety for the safety of himself and family: *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303. In forcible entry and detainer, damages for mental anguish cannot be recovered: *Anderson v. Taylor*, 56 Cal. 131; 38 Am. Rep. 52. But in addition to these cases, where damages for mental suffering in conjunction with other damages were re-

fused, cases may be found denying the right to recover where the whole injury is to feeling. Thus where fright caused by negligence of the defendant was so great and sudden as to immediately produce physical sickness and suffering, it is held that damages cannot be had. The principle is, that for the mere mental suffering there could be no recovery, and the physical injury is too remote, being unlikely to result from the wrongful act: *Victorian R'y Commissioners v. Coultas*, L. R. 13 App. C. 222; *Fox v. Borkey*, 126 Pa. St. 164; *Ewing v. Pittsburgh etc. R'y Co.*, 147 Pa. St. 40; *Lehman v. Brooklyn etc. R. R. Co.*, 47 Hun, 355; *Allsop v. Allsop*, 5 Hurl. & N. 534. In Minnesota, however, fright causing nervous convulsions and illness is held to be ground for damages. But even here the action was sustained on account of the physical injury as the proximate result of the negligent act, and not on account of the intervening mental suffering, the court conceding that this alone would not warrant recovery: *Purcell v. St. Paul City R'y Co.*, Minn., Jan. 18, 1892; 50 N. W. Rep. 1034. So in *Bray v. Latham*, 81 Ga. 640, an injury to health, caused by fright and physical exposure, was held ground for damages. It is hard to conceive of an injury which would wound the feelings more deeply than the disturbance and desecration of the grave of a near relative. Yet for such a wrong an action did not lie at common law. The stern doctrine was, that there is no property in a corpse, and the only protection of the grave was by criminal indictment: 2 Bla. Com. 429; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. L. 227; 14 Am. Rep. 667. It seems the owner of the lot could bring an action of trespass *quare clausum fregit*, and this was held to be the only action lying for disturbing the remains of a deceased child, additional damages being in this case allowed for injury to feeling because the act was willful or wanton: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759. It would not be allowable to maintain such a suit as the present under the assumption that the injury is to the person. In the old division of legal wrongs, "injuries to the person" do not include everything which the word "person" may be fairly understood to cover. Thus in Ohio and in Illinois, there is a statute giving the wife a right of action against any person intoxicating the husband, whereby she was injured in person, property, or means of support. In both states it is held that she cannot recover under such statute for mental anguish, even when entitled to damages on other

grounds, as that is not an injury to the person: *Mulford v. Clewell*, 21 Ohio St. 191; *Freese v. Tripp*, 70 Ill. 496. In Illinois some of the judges dissented from the majority opinion, but all agreed that mental anguish alone would not make a cause of action.

The law protects the person and the purse. The person includes the reputation: *Johnson v. Bradstreet Co.*, 87 Ga. 79. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one, by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries.

The case of *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, suggests that the doctrine it opposes would open up a new field of litigation. This is worthy of remark. Except in Texas, suits like this have been infrequent in the past. If their foundation principle be sanctioned, they are likely to multiply indefinitely. Nowhere can be found any satisfactory suggestion of a principle to restrain such suits within reasonable limits. How much mental suffering shall be necessary to constitute a cause of action? Let some of the courts favoring recovery measure out the quantity. If they are unable to do this, then, on principle, any mental suffering would be actionable, the degree of it merely determining the *quantum* of damages. The cases do suggest as a restriction that the plaintiff must be entitled to damages on some other ground, or to nominal damages at least; in other words, there must be an infraction of some legal right of the plaintiff; then the damages may be increased for the mental suffering. If

the plaintiff must be entitled to substantial damages on other grounds, then mental suffering alone is not a ground for damages, which is the very point contended for. To speak of the right to nominal damages as a condition for giving substantial damages is a palpable contradiction. To give nominal damages necessarily denies any further recovery. It is said there must be an infraction of some legal right, attended with mental suffering, for this kind of damages to be given. If this be true law, why is not the mental distress always an item to be allowed for in the damages? We have seen that, though allowed in some, it is in many cases excluded. Every man knows that the violation of any material right is necessarily productive of more or less pain of mind. Then why not compensate it in every instance where a right has been violated? In no case whatever are damages recoverable, unless a legal duty has been broken. By the test proposed, it is first granted that mental suffering alone is not actionable; then a case arises in which there is no actual damage, unless mental suffering be such, when it is simply assumed that it is actual damage. Throwing away the lame pretense of basing recovery for mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery is, in real substance, an effort to protect feeling by legal remedy. If mental suffering be a self-sufficient element of damage, as in reason it must be, to recover when no other damage is claimed, why is not the causing of mental suffering itself an infraction of a legal right? Why should the law of torts lag behind the law of damages? Can it do so in a sound system?

Our code (sec. 3067) declares: "In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed." There is no further definition or description of the torts here referred to by which any case may be recognized as of this class. But it is manifest that the language quoted does not say or imply that injury to the peace, happiness, or feelings shall always be itself a tort, but rather the reverse. In view of the fact that no description or designation is attempted of this class of torts, and in view of the general purpose of the code, this section obviously does not mean to create new torts,

or change the law of damages, but only to declare the pre-existing law: See *Central R. R. etc. Co. v. Kelly*, 58 Ga. 107; *Georgia R. R. Co. v. Homer*, 73 Ga. 257; *Central R. R. Co. v. Senn*, 73 Ga. 712; *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449; *Cox v. Richmond etc. R. R. Co.*, 87 Ga. 747. No case has been found to give an authoritative construction to this section as a whole, nor is it necessary to do so now. It suffices for present purposes to say that it does not alter the prior law.

It seems there is no public policy to be subserved by giving damages for mental suffering, as a general rule, and the law does not allow it. But it is urged that the public occupation of telegraph companies creates between them and the public a special relation in which their responsibility is greater than that of other persons. So much of their business and profit is derived from the acceptance of messages involving feelings only, that at first view it would seem legitimate and salutary to require them to answer in damages for any dereliction of duty in this important part of their activity. The argument is, that in the exercise of a public employment, they undertake for hire to serve the feelings of their customers, and therefore ought to pay for negligent non-performance or mis-performance of this peculiar function. This reasoning is unanswerable in so far as it proves a right of action to arise out of the breach of duty. But how about damages and the measure of damages? It can scarcely be that a new and exceptional principle of damages emerges, *ex proprio vigore*, from unknown recesses of the law when occasion seems to require it, or that the court can do more than adapt and apply principles already existing when novel transactions, such as those which make up the business of telegraphy, become the subjects of adjudication. Precedents must be followed, else the law will become a wandering, uncertain thing. If our understanding of the law as hitherto expounded by its accredited oracles be correct, it would be a judicial innovation to require feelings which had, even under contract or public duty, the right to expect help to be solaced with damages for the disappointment, however severe, at losing the promised benefit. If the subject needs new law, the law-making powers may create it; but we decline to usurp their prerogative. In fact, the legislature apparently has thought that nominal liability is not adequate to enforce the good policy of stimulating diligence in the carriage of non-financial messages, including

those which affect the strongest feelings of humanity. It was, of course, a matter of general knowledge that many dispatches which the company is paid to carry, if not carried with due diligence, would entail no pecuniary loss upon sender or sendee, and therefore the company be subjected to mere nominal liability. The legislature recognized this as a subject for legislation, and passed the act of 1887, providing a penalty in case any message is not duly transmitted and delivered. This act gives a conventional redress of some money value, and is perhaps the best remedy that could be devised. It provides a penalty for punishment of the wrong-doer. Of course it does not affect to any extent the pre-existing law of damages, and cannot be construed as superseding or modifying any right of recovery existing independently of its provisions: *Couch v. Steel*, 3 El. & B. 402; Acts 1887, p. 111; *Western Union Tel. Co. v. Taylor*, 84 Ga. 408. If the remedy in terms were exclusive of all others, or if damages could be predicated on this statute which were not recoverable before, this whole discussion might have been superfluous. The record shows that the plaintiff recovered the penalty imposed by the statute, and that is all the redress to which he is entitled. Perhaps the safest expedient for a case of this kind, which involves a public policy, is to fix an arbitrary sum to be recovered by the injured person, and this the legislature has done: See *Russell v. Western Union Tel. Co.*, 3 Dak. 315.

There was no error in sustaining the demurrer to so much of the plaintiff's petition as sought recovery simply for pain and anguish of mind.

Judgment affirmed.

TELEGRAPH COMPANIES — DAMAGES FOR MENTAL SUFFERING — WHETHER RECOVERABLE. — In an action against a telegraph company for negligent delay in delivering a message, damages cannot be recovered for mere mental suffering disconnected from physical injury, and not the result of the willful wrong of the defendant: *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300, and note. The opposite view is held in *Western Union Tel. Co. v. Nations*, 82 Tex. 539; 27 Am. St. Rep. 914; and see note, in which the cases and the conflict of opinion on this subject is discussed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

McAFEE v. REYNOLDS.

[180 INDIANA, 83.]

LIEN OF JUDGMENT NOT AFFECTED BY LAPSE OF TIME DURING WHICH CREDITOR'S HANDS TIED. — The time during which the hands of a judgment creditor are tied by a statutory provision restraining proceedings to enforce the judgment for the period of one year after the death of the debtor cannot be considered in computing the time during which the lien of the judgment continues in force.

JUDGMENT LIEN, ACTION TO HAVE SUPERIORITY OF, DECLARED, MAINTAINABLE. — One who holds a judgment which is a lien upon real estate may maintain an action to have his lien declared superior to a claim asserted to be superior to it.

EQUITY ASSUMES JURISDICTION WHERE REMEDY AT LAW INADEQUATE. —

When the remedy at law is inadequate, equity will assume jurisdiction.

LAPSE OF TIME BETWEEN BRINGING SUIT AND DECISION CANNOT DEFEAT ACTION. — The lapse of time between the bringing of a suit and the rendering of a decision cannot operate to defeat the plaintiff's cause of action, where he has been guilty of no laches in its prosecution.

LIEN OF JUDGMENT FIXED BY STATUTE CANNOT BE PROLONGED BY COURT. —

The lien of a judgment which is created and limited by statute cannot be prolonged by the courts beyond the period fixed by the legislature.

JUDGMENT LIEN NOT ENFORCEABLE AFTER ITS EXPIRATION PENDING SUIT.

— The lien of a judgment which expires pending suit cannot be enforced against an inferior lien, although the suit was commenced before it expired.

JUDGMENT FINAL WILL BE RENDERED BY APPELLATE COURT WHEN. — Where

the facts are not in dispute, and all the matters appear on the face of the record, enabling the appellate court to ascertain and declare the justice of the case, it will render such a judgment as will secure to each party his just rights, instead of remanding the cause for a new trial.

THE opinion states the case.

R. P. Davidson, for the appellant.

J. H. Adams and J. B. Sherwood, for the appellee.

ELLIOTT, J. On the nineteenth day of June, 1877, Robert J. Brown was the owner of the real estate involved in this controversy, and on that day Earhart and others obtained judgment against him. This judgment became a lien upon the real estate, and has never been paid or satisfied. Brown died on the sixth day of November, 1877. By proper assignments, the appellee became the owner of the judgment. James M. Brown was appointed the administrator of the estate of Robert J. Brown, deceased, on the third day of December, 1877, and on the thirtieth day of July, 1878, petitioned for an order to sell the land to pay the debts of his intestate. Joseph Kious became the successor of James M. Brown, and filed a supplemental petition for an order for the sale of the property, and an order was made as prayed. Neither the appellee nor any other lien-holder was a party to the proceedings, except in so far as the notice given by publication made under the law then in force may have constituted them parties. The real estate was sold pursuant to the order to the appellant on the first day of October, 1877, the purchase-money was paid by him, and a deed was executed and approved. Under this deed the grantee entered into possession. The estate of Robert J. Brown was insolvent. The only mention of liens in the proceedings on the petition was made in the decree approving and confirming the deed executed by the administrator, and the mention there made is not of the judgment of the appellee, but of a judgment owned by John P. Carr.

The present action was begun on the twenty-fourth day of February, 1888.

The conclusions of law stated by the court read thus:—

“1. The rights of the plaintiff must be determined as they existed at the commencement of this suit. The fact that ten years, exclusive of the time the plaintiff was restrained from prosecuting her remedy upon the judgment by the death of the judgment defendant, has expired since the commencement of this suit is no bar to his right to recover.

“2. The sale of the land by the administrator was made to the defendant subject to the lien of the plaintiff's judgment. So much of the decree confirming the deed to the defendant as adjudged that he take the land free of liens and encumbrances is void as to the plaintiff. There is nothing in the petition to sell, the appraisement, the order of sale, or the report of sale that authorizes any such decree.

"3. The plaintiff is entitled to the relief prayed for in his complaint, with costs."

It is obvious that the right of the plaintiff created by her judgment was not divested by the decree directing the sale of the lands, nor is it contended by appellant's counsel that the lien was extinguished. It is also evident that the time the hands of the judgment creditor were tied by the statutory provision restraining proceedings to enforce a judgment for the period of one year after the death of the debtor cannot be justly considered in computing the time during which the lien continues in force: *Jones v. Detchon*, 91 Ind. 154. This, we understand, is conceded by appellant's counsel.

The contention of appellant's counsel is, in effect, that the lien of the judgment having expired on the fourth day of July, 1888, after that time no decree could be rendered declaratory of its existence and providing for its enforcement. The appellee's counsel assert that "the question is, not whether the lien of a judgment upon real estate may be prolonged beyond the statutory period fixed for such liens, but whether the rights and liens existing and held by the plaintiff at the time of bringing suit shall be adjudged and enforced as of the date of the commencement of the action." This statement of the respective positions of counsel exhibits the principal question in the case.

The land had passed into the hands of a third person, the purchaser at the administrator's sale, and hence the judgment creditor had a right to bring a suit to have his lien declared and freed from the claim asserted by the purchaser under the administrator's deed: *Decker v. Gilbert*, 80 Ind. 107; *Faulkner v. Larrabee*, 76 Ind. 154.

The claim of the appellant was an obstruction to the enforcement of the judgment lien, and the creditor had a right to ask that the obstruction be removed, so as to enable her to realize the benefit of her judgment: *Quarl v. Abbett*, 102 Ind. 233; 52 Am. Rep. 662. Under the old procedure, *scire facias* was the appropriate procedure where the rights of a third person intervened: 1 Freeman on Executions, 81. But where such a proceeding would not give adequate relief, the assistance of equity was properly invoked. In such a case as this, it is evident that a mere motion for leave to issue an execution would not secure adequate relief, since a sale upon execution would still leave the claim of the appellant undetermined; so that if it were conceded that the remedy by motion exists

where the rights of a third person, based upon a claim of title created by a decree in judicial proceedings, have intervened, and where the judgment has died, still that remedy would not be adequate, inasmuch as the order would not fully remove the obstruction created by the sale under the decree. The rule is, that where there is some remedy at law, but not an adequate one,—that is, one that will adjudicate the entire controversy and grant full relief,—equity will assume jurisdiction: *Watson v. Sutherland*, 5 Wall. 74; *Denny v. Denny*, 113 Ind. 22; *Bishop v. Moorman*, 98 Ind. 1; 49 Am. Rep. 731, and authorities cited. Whatever view is taken of the case, the result is, that the conclusion must be that the suit is an appropriate one, and there was no mistake in electing the remedy.

What we have said establishes the initial proposition involved, inasmuch as it proves that the plaintiff stated a cause of action when she began her suit. If she is to be entirely defeated, it must be for the reason that the efflux of time has destroyed her right.

Ordinarily, a plaintiff will succeed, if, at the time he sues, a complete cause of action exists in him. This is a general rule, to which there are few exceptions. The cases wherein the plaintiff by his own act divests himself of a right of action constitute the most numerous class of exceptions, but there is here no element which makes that class of cases even remotely analogous, since no act was done by the plaintiff after suit which released or impaired her rights. If the right of action which existed in the plaintiff when she began her action has been destroyed, it must be because the law so operates as to take it from her. There is no express enactment divesting the cause of action, and no event has occurred changing the position of the parties. The only thing that can be said to have affected the case in any way is the lapse of time. If this can be assigned a retrospective effect, then there is plausibility in the contention that the right of action was wholly swept away; if not, then the contention is foundationless.

If the lapse of time, without any fault of a plaintiff, or any act of his, can destroy a cause of action, then it is in the power of a defendant, by prolonging litigation, to destroy a meritorious cause of action, and this is a result not to be reached without strong and cogent reasons. If a cause of action exists when a suit is begun, the plaintiff has a substantive right; and

where there is a right, there is a remedy. Where there is a right and a corresponding remedy, and steps have been taken to vindicate the right, a plaintiff has done all that the law requires of him, and he cannot be turned out of court because delay, attributable to no fault of his, renders the right asserted by him ineffective. It seems clear to us, on principle, that the appellee did not lose her cause of action because of the lapse of time, and that the time which intervened between the bringing of the suit and the decision cannot so operate as to defeat her suit. What its effect is upon the measure of relief is quite another question, and one that will be considered further on. It may, however, be here said appropriately that the right to sue is one thing, and the quantity or degree of relief quite another thing.

The difficult question here is not as to the existence of a cause of action at the time the complaint was filed, but the difficult question is as to the measure of relief the plaintiff was entitled to at the time the decree was entered. The difficulty is created by the fact, for fact it is, that at the time the decree was pronounced the judgment of the plaintiff had ceased to have any force as a lien.

The proposition of appellant, that the lien of a judgment, as fixed by the statute, cannot be prolonged by the courts is indisputably correct: *Wells v. Bower*, 126 Ind. 115; 22 Am. St. Rep. 570; *Shanklin v. Sims*, 110 Ind. 143; *Brown v. Wuskoff*, 118 Ind. 569; *Applegate v. Edwards*, 45 Ind. 329; *Albee v. Curtis*, 77 Iowa, 644; *Hutcheson v. Grubbs*, 80 Va. 251; *Boyle v. Maroney*, 73 Iowa, 70; 5 Am. St. Rep. 657; *Spencer v. Haug*, 45 Minn. 231; *Newell v. Dart*, 28 Minn. 248.

A judgment lien is the creature of statute, owing its life and force entirely to legislation. It has, indeed, been said that a judgment is a charge on land, but not, in strictness, a lien: *Shirk v. Thomas*, 121 Ind. 147; 16 Am. St. Rep. 381; *Johnson v. Hess*, 126 Ind. 298 (311); *Brunsdon v. Allard*, 2 El. & E. 19; *Ex parte Foster*, 2 Story, 131.

A party who secures a judgment obtains such a charge upon land as the statute gives, and nothing more, for it is clear that he can acquire only what the statute creating the right vests in him. Our statute declares that the lien shall continue for ten years, and "no longer," thus definitely and positively limiting the duration of the lien. As no court is above the law, and as all courts must enforce the law as it is written it necessarily results that a lien created and limited by stat-

ute cannot be extended beyond the period fixed by the law-makers.

A party may forfeit a right to have a lien declared and established, and yet have no right to a decree extending its life beyond the statutory period. It is this right which the appellee possessed when she began her suit, and not a right to have a new lien created, nor an existing one prolonged beyond the limit fixed by law. Courts cannot create a judgment lien on land, nor can they fix its duration, since that is the prerogative of the legislature. No authority for making a judgment a lien on land, or for designating its incidents, can be found in the common law, since at common law a judgment was not a general lien upon that species of property. There was, it is true, a right to make a judgment available to a limited extent; but, as said by Marshall, C. J., in the case of *United States v. Morrison*, 4 Pet. 124, "the lien is the consequence of a right to take out an *elegit*."

We are satisfied that the trial court did not err in adjudging that the appellee had a right of action at the time his suit was commenced, but we cannot escape the conclusion that it erred in holding that she was entitled to a decree ordering the land sold, and placing the lien above the title of the appellant. This was erroneous, for the reason that it assumed to give vitality to a lien which, by positive and inexorable law, was lifeless. The conclusions of law, and the decretal orders based on them, show that the trial court affirmed that the appellee had a right to have the land sold to discharge the statutory lien, and that the only right of the appellant was to the surplus remaining after the satisfaction of the judgment. The theory of the court that the lien could be prolonged directly or indirectly was erroneous, for when the lien perished by operation of law, it could not be revived, nor could a new lien be created. The utmost that the appellee was entitled to was, as we have shown, a decree declaring that when her suit was brought she had a lien paramount to the title of the appellant. When the court went beyond this, it erred, inasmuch as in so doing it prolonged the lien beyond the time of its legal life.

The record fully enables us to ascertain and declare the justice of the case, and hence it is our right and our duty to render such a judgment as will secure to each party his just rights. This is a general power resident in all high appellate tribunals, and it has been often exercised in cases, such as this,

where the facts are not in dispute, and all the material matters appear upon the face of the record: *Parker v. Hubble*, 75 Ind. 580; *Buchanan v. Milligan*, 108 Ind. 433; *Western Union Tel. Co. v. Brown*, 108 Ind. 538 (544); *Bartholomew v. Pierson*, 112 Ind. 430; *Brown v. Jones*, 113 Ind. 46, and cases cited, p. 50; 8 Am. St. Rep. 623; *Sinker v. Green*, 113 Ind. 264; *Murdock v. Cox*, 118 Ind. 266; *Security Co. v. Arbuckle*, 119 Ind. 69; *Louisville etc. R. R. Co. v. Etzler*, 119 Ind. 39 (44); *Roberts v. Lindley*, 121 Ind. 56, 59, and cases cited; *Lapham v. Dreisvogt*, 36 Mo. App. 275; *Duck v. Peeler*, 74 Tex. 268; *Clark v. Sonnenschein*, L. R. 25 Q. B. D. 226; *Luthe v. Luthe*, 12 Col. 421; *Athens etc. Works v. Bain*, 77 Ga. 72; *McKenzie v. Peck*, 74 Wis. 208.

The power, as the authorities declare, is one that should be freely exercised, where its exercise will put an end to litigation and yield justice. To accomplish this, it is always proper to so mold the form of the mandate as that the trial court may carry into effect, by the appropriate record entries, the judgment of the appellate tribunal.

The mandate of this court is, that the judgment of the trial court be in part affirmed and in part reversed; that the costs of the case in the court below up to the entry of the special finding be taxed against the appellant; that subsequent costs in that court be taxed in equal proportion against the respective parties; that the costs in this court be divided and taxed in like manner; and that the case be remanded, with instructions to enter a decree in accordance with this opinion, by eliminating so much of the decree as adjudges a sale of the land, prolongs the lien, and limits the right of the appellant to the surplus, and by entering the proper judgment for costs against the respective parties as herein indicated.

DURATION OF JUDGMENT LIEN.—Where a statute expressly limits the existence of a judgment lien to two years, a continuance beyond that time will not be presumed: *Isaac v. Swift*, 10 Cal. 71; 70 Am. Dec. 698. See also notes to *Boyle v. Maroney*, 5 Am. St. Rep. 663, and *Wells v. Bower*, 22 Am. St. Rep. 570.

SUSPENSION OF RIGHT OF ACTION UPON A JUDGMENT.—The time during which execution of a judgment is stayed by order of court, or by appeal with stay bond, must be excluded from the computation of the statutory time during which the judgment remains a lien: *Barroilhet v. Hathaway*, 31 Cal. 395; 89 Am. Dec. 193. Similarly, where it was provided by the Code of Civil Procedure of New York that no execution could issue to enforce a judgment which is a lien upon the real estate of a deceased judgment debtor until one year after his death, it was held that such year cannot be counted

as part of the ten years during which the lien of a judgment upon real estate continues: *Matter of Holmes*, 131 N. Y. 80. So where the statute of limitations has begun to run against an intestate in his lifetime, its operation is suspended during the period within which suits against his personal representatives are forbidden: *Henderson v. Hsley*, 11 Smedes & M. 9; 49 Am. Dec. 41; see note to *Miller v. Surlis*, 65 Am. Dec. 601.

LAPSE OF TIME WHILE A SUIT IS PENDING does not prejudice a party's right: See note to *Bell v. Hudson*, 2 Am. St. Rep. 807.

INADEQUACY OF LEGAL REMEDY A GROUND FOR RELIEF IN EQUITY: *Fitzmaurice v. Mosier*, 116 Ind. 363; 9 Am. St. Rep. 854. See also *Sherman v. Clark*, 4 Nev. 138; 97 Am. Dec. 516, and note, in which several references to other cases in the series are given.

WILLIAMS v. CITIZENS' RAILWAY COMPANY.

[130 INDIANA, 7L]

MUNICIPAL CORPORATION HAS NO AUTHORITY TO DECIDE LEGAL CONTROVERSIES. — The act for the incorporation of cities does not vest in the common council of cities the power to determine legal controversies concerning personal or property rights, but the decision of such controversies must be made by judicial tribunals, and to them an injured party has a right to appeal for a vindication of his rights.

RIGHT TO USE STREET CANNOT BE DESTROYED OR IMPAIRED WHEN. — Where a right to use a street is acquired pursuant to a statute and under a license from the municipality, it is in the nature of a contract right, and the municipality itself cannot destroy nor materially impair it; and the courts must decide all controversies in which such rights are involved.

CORPORATE FUNCTIONS, EXERCISE OF, CAN BE QUESTIONED BY STATE ONLY WHEN. — Where there is an assumption of corporate rights and functions, and an exercise of such rights and functions under claim and color of law, only the state can question the validity of the assumption and exercise of such functions and rights, and an individual cannot successfully assail them in a collateral proceeding.

USE OF STREET FOR MOVING HOUSE NOT ORDINARY USE. — The use of a street for the purpose of moving a house is not an ordinary and usual, but an extraordinary and unusual, use.

MOVING HOUSE ACROSS STREET-RAILWAY TRACK ENJOINED WHEN. — When the moving of a house across the track of an electric street-railway necessitates the stoppage of traffic for many hours, and the cutting or destruction of the wires, such moving may be restrained by the courts, even though the common council of the city has failed or refused to take any steps to prevent such injury or destruction.

THE opinion states the case.

H. C. Dodge, for the appellants.

J. H. Baker and F. E. Baker, for the appellee.

ELLIOTT, C. J. The complaint contains these material allegations: That the appellee is a corporation organized under the laws of the state for the purpose of constructing an electric street-railway upon the streets of the city of Elkhart; that it is authorized to operate a railway with any kind of motive power except steam; that it is authorized to erect poles and stretch wires along the streets for the purpose of operating its line of railway by means of electricity; that it has constructed its tracks, erected poles, stretched wires, and procured electrical appliances for the purpose of operating its railway; that in so doing it has expended more than eighty-eight thousand dollars; that it has constructed its tracks, erected poles, and made necessary connections for operating a line upon Main Street, in the city of Elkhart, under the right and authority conferred upon it; that its railway tracks upon that street have been and are used by it in conducting its business as a public carrier of passengers, and for such purpose are and have been in constant use; that the interruption of its business would interrupt a public service and use much needed by the public; that one of the defendants is the owner of a frame building, which it has employed one of its co-defendants to move upon and along Main Street, and the work of moving the building has been commenced; that the building is so large that it cannot be moved along Main Street without destroying the wires of the plaintiff, and entirely stopping the movement of its cars on Main Street, and other streets of the city; that the defendants are threatening to cut, or otherwise destroy, the wires, and to stop the running of cars; that they are moving the house so rapidly that the building will reach Main Street within three hours; that the injury which they threaten to do will be irreparable, and will wholly prevent the use of the street and cause the plaintiff great damage; that the building can be moved without passing on Main Street. Prayer for an injunction.

The point first made by the appellants' counsel in his assault upon the complaint is, that "the Elkhart circuit court had no jurisdiction." In support of this point it is argued that the common council of the city has exclusive jurisdiction over the city streets, and that the court could therefore have no jurisdiction of the general subject. We are referred to the cases of *Kistner v. City of Indianapolis*, 100 Ind. 210, and *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222, but it is palpably evident that these cases are not relevant to the present

controversy. It needs neither argument nor authority to make good the proposition that the act for the incorporation of cities does not take, nor mean to take, from the courts the authority to decide legal controversies concerning personal or property rights, and vest in the common council of cities the power to determine such controversies. The decision of such controversies must be made by judicial tribunals, and to them an injured party has a right to appeal for a vindication of his rights.

A failure or refusal of the common council of a city to take steps to prevent the injury or destruction of a line of railway does not preclude the owner from seeking redress in the courts of the state. Where a right to use a street is acquired pursuant to statute and under a license from the municipality, it is in the nature of a contract right, and the municipality itself cannot destroy nor materially impair it. The courts must decide all controversies in which such rights are involved: *Indianapolis etc. R. R. Co. v. Citizens' Street R. R. Co.*, 127 Ind. 369. See authorities collected in Elliott on Roads and Streets, 564, notes 1, 2.

It is undoubtedly true that all such rights are subordinate to the paramount power usually denominated the police power, for that power cannot be annihilated by contract: *Jamieson v. Indiana etc. Co.*, 128 Ind. 555. See also authorities cited in Elliott on Roads and Streets, 573, note. But here no question concerning the nature of that great power is presented.

The contention that the appellee must fail because there is no statute authorizing the use of electricity as a motive power for propelling cars along a line of street-railway cannot prevail, for the reason that the appellants are not in a position to make available the doctrine they assert, even if it should be granted that the doctrine is sound.

There is plausibility, at least, in the argument of the appellee's counsel, that a just and reasonable construction of the statute providing for the incorporation of street-railway companies authorizes the employment of any kind of motive power now in common use except steam. The terms "street-railway" or "horse-railway" may possibly be considered as generic terms, and if so, their use would not necessarily imply that only animals can be employed for propelling cars. But we feel that it is neither necessary nor proper for us to attempt to give an authoritative decision of this question in the present case, and we refrain from doing so. Our conclu-

sion upon this branch of the case must be placed upon another ground.

In the case before us the municipal council passed an ordinance authorizing the use of electricity as a motive power. The company, acting under this grant, has used, and is using, electricity. The company has at least assumed to organize as a corporation under the laws of the state, and to organize for the purpose of operating a street-railway employing electricity as the motive power for the propulsion of its cars along its tracks. It has assumed, under color of law and claim of right,—if, indeed, its assumption is not founded on stronger grounds,—to exercise corporate functions as an electric street-railway company. We can see no reason why the case is not governed by the rule that where there is an assumption of corporate rights and functions, and an exercise of such rights and functions under claim and color of law, only the state can question the validity of the assumption and exercise of such functions and rights, and an individual cannot successfully assail them in a collateral proceeding. The case seems to us, indeed, to be one strongly invoking the application of the rule: *Brookville etc. Co. v. McCarty*, 8 Ind. 392; 65 Am. Dec. 768; *Aurora etc. R. R. Co. v. City of Lawrenceburgh*, 56 Ind. 80; *White v. State*, 69 Ind. 273; *Baker v. Neff*, 73 Ind. 68; *Logan v. Vernon etc. R. R. Co.*, 90 Ind. 552, and authorities cited. Interesting discussions of the general subject will be found in the cases of *New Orleans etc. Co. v. Hart*, 40 La. Ann. 474; 8 Am. St. Rep. 544; *Taggart v. Newport etc. R'y Co.*, 16 R. I. 668; *Williams v. City Electric etc. R'y Co.*, 41 Fed. Rep. 556; *Potter v. Saginaw etc. R'y Co.*, 83 Mich. 285.

If it were conceded that the acts of the corporation were beyond its powers, it is, nevertheless, quite clear that an individual cannot insist that its corporate existence has terminated, or that he may, at his pleasure, confiscate or destroy its property. It would violate the plainest principles of law to permit an individual citizen to confiscate or destroy the property of a corporation which has assumed to exercise rights under the laws of the state, and to which the officers of a governmental subdivision have given recognition by granting to it the right to use the streets of a city. This would be true even in a case where no extraordinary claim was asserted by the individual, and certainly is true where an individual claims the right to make an extraordinary use of the public streets.

The appellants in this case are not asking to be allowed to make an ordinary use of the streets of the city; they are, on the contrary, asking that they be permitted to use the streets in an extraordinary mode, and for an unusual purpose: *Day v. Green*, 4 Cush. 433; *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536. See authorities cited in Elliott on Roads and Streets, 578, note 2.

If the appellants were asking to be allowed to make use of the street in the ordinary mode, we should have a very different case, but that is not what they demand. To concede their demands would be to assert a doctrine that would authorize an individual to interrupt traffic on great lines of railways running through a city at his pleasure, no matter how grave the injury that would result from such an interruption to the public or the railway companies. It is not to be forgotten that the public have interests in such a controversy as this, as well as private corporations, and an individual who seeks to disturb the public right will find no favor, where the claim he asserts is an extraordinary one, such as that here asserted. That the demand in this case is an extraordinary one is shown by the authorities to which we have here referred, but it may be made more plain by simply saying that the purpose for which highways are laid out and dedicated is that of travel in the usual modes. It would be strange, indeed, if large buildings could be moved along the thronged streets of a city without control or restriction; and it would be equally strange if the owner of a building could destroy the property of others, in order to enable him to move his building from one place to another.

We are not, in this case, concerned with the question as to whether a house may be moved across a street-railway track, where no injury will be done, and where only a few minutes' suspension of traffic will be caused; for here the complaint and the special finding show that the appellee's property would be destroyed, and traffic interrupted for many hours, if the appellants were permitted to do what they have attempted and threatened to do.

Judgment affirmed

POWERS OF MUNICIPAL CORPORATIONS. — Any fair, reasonable doubt concerning the existence of power in a municipal corporation is resolved against it. It has such powers as only are granted in express words, necessarily or fairly implied in or incident thereto, and those essential to its declared objects and purposes: *St. Louis v. Bell Tel. Co.*, 96 Mo. 623; 9 Am. St. Rep. 370;

Village of Carthage v. Frederick, 122 N. Y. 268; 19 Am. St. Rep. 490. Legislature has no power to subject the people of cities to the uncontrolled and arbitrary will of a common council, nor deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers: *In re Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310.

RIGHTS ARISING OUT OF A LICENSE TO USE CITY STREETS. — Franchise to construct and maintain a street-railway is not a mere license or privilege enjoyable only during the life of the grantee, and revocable at the will of the state. It has been uniformly regarded as indestructible by legislative authority, and as constituting property in its highest sense: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684.

VALIDITY OF A CORPORATE CHARTER can only be attacked at the instance of the state, and not in a collateral proceeding: *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84, and note; *Grand Rapids v. Grand Rapids Hydraulic Co.*, 68 Mich. 606; *Elizabethtown Gas etc. Co. v. Green*, 46 N. J. Eq. 118; *Lumber Co. v. Ward*, 30 W. Va. 43.

USES OF PUBLIC STREET. — Necessity may justify the use of a street for the purpose of transporting things in an unusual manner, or of transporting such things as necessarily obstruct the street for a time. Such uses are not necessarily illegal; for streets as passways must frequently be subjected to uses strictly in the line of the purpose for which they exist, but unusual because of the nature of the things to be transported, or of the vehicles necessary to their transportation: *Taylor v. Dunn*, 80 Tex. 652.

ANDERSON SCHOOL TOWNSHIP v. MILROY LODGE, F. AND A. M., No. 139.

[130 INDIANA, 108.]

PARTITION OF BUILDING, STORIES OF WHICH ARE OWNED BY DIFFERENT OWNERS, NOT DECREED WHEN. — Where land is purchased and a building is erected thereon by three parties under an agreement that one shall own and use the land and the first story, the second shall own and use the second story, and the third shall own and use the third story, with the right of ingress and egress, there can be no partition among the parties.

THE opinion states the case.

B. L. Smith and C. Cambern, for the appellant.

W. A. Cullen, J. D. Megee, D. S. Morgan, and D. Morris, for the appellee.

ELLIOTT, C. J. The appellant alleges in its complaint that it is the owner of the real estate in controversy, and prays partition. The substance of the answer of the appellee is this: The appellee agreed with the appellant and another person to purchase the land in dispute, and to erect a building thereon;

that the first story of the building should be owned and used by the appellant, the second story by the third person referred to, and that the third story should be owned and used by the appellee; that the appellant should have the control of the ground, subject to the appellee's right of ingress to and egress from its part of the building.

It seems very clear to us that the answer shows that the appellant has no right to partition. The erection of the building under the agreement vested the appellee with a right of access to its part of the structure, and of that right it cannot be deprived. Partition cannot be effected without destroying that right, and hence partition cannot be decreed. But this is not the only reason why the appellant is not entitled to partition, for there is this additional reason, namely, each party owns its part of the building in severalty. As each party owns its part of the property in severalty, it is legally impossible that partition can be awarded, for there is no community of interest. The case is against the appellant, upon principle and authority: *McConnell v. Kibbe*, 43 Ill. 12; 92 Am. Dec. 93; *Soutter v. Atwood*, 34 Me. 153; 56 Am. Dec. 647; *Russell v. Beasley*, 72 Ala. 190; *Baldwin v. Humphrey*, 44 N. Y. 609; *Appeal of Latshaw*, 122 Pa. St. 142; 9 Am. St. Rep. 76; *Freeman on Cotenancy and Partition*, sec. 87; *Knapp on Partition*, 39, 40.

The agreement as to the construction, ownership, and use by the parties of different parts of the building is not made voidable by the statute of frauds. In support of this proposition, it is sufficient to say that the agreement was fully performed and possession taken, although other reasons might be assigned for our conclusion.

The finding is well supported by the evidence.

Judgment affirmed.

WHO MAY COMPEL PARTITION: See monographic note to *Nichols v. Nichols*, 67 Am. Dec. 703-712. A tenant in common is entitled to a partition, however inconvenient or injurious it may be: *Hanson v. Willard*, 12 Me. 142; 28 Am. Dec. 162; *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198; *Campbell v. Lowe*, 9 Md. 500; 66 Am. Dec. 339. The right of co-owners of property to demand a partition thereof is absolute: *Reynolds v. Reynolds*, 43 La. Ann. 1118. To justify proceedings in the probate court for a partition of lands, or a sale for partition, under the provisions of sections 3237 and 3253 of the Alabama code, each part owner must be interested in the entire lands sought to be sold or partitioned: *Hall v. Caperton*, 87 Ala. 286. Similarly, in Ohio, it is held that partition cannot be had in one suit of several tracts, by a tenant in common of all, where the ownership therein, other than his,

is vested in persons who have between themselves no common interest in the separate tracts: *Matter of Prentiss*, 7 Ohio, pt. 2, 129; 30 Am. Dec. 203. But, upon this subject, consult *Charleston etc. R. R. v. Leech*, 33 S. C. 175; 26 Am. St. Rep. 667. Under a statute allowing the court to decree the sale of property if a partition cannot be made without loss or injury to the parties interested, it was held that as there could not be a partial partition before the statute, there could not be a sale of a part interest in the property under the statute, but the entire property must be divided or sold, and all the co-tenants must be made parties: *Dugan v. Mayor of Baltimore*, 70 Md. 2. That all tenants in common are indispensable parties to a suit in partition, see also *Holloway v. McIlhenny Co.*, 77 Tex. 657.

WHAT PREMISES MAY BE PARTITIONED. — Partition may be had of a mill and mill privilege: *Hanson v. Willard*, 12 Me. 142; 28 Am. Dec. 162. But in *Brown v. Turner*, 1 Aikens, 350, 15 Am. Dec. 696, it was held that a saw-mill, mill-pond, and mill-yard were not partible, and therefore not proper subjects of partition. In *Conant v. Smith*, 1 Aikens, 67, 15 Am. Dec. 669, partition of land, valuable chiefly as an ore-bed, was refused, because the court could not ascertain the value of the different parts, and because the parties could obtain a less hazardous and more adequate remedy in chancery; while in *Kemble v. Kemble*, 44 N. J. Eq. 454, it was held that a partition of lands containing mineral deposits cannot be ordered by a court of equity, if the location, extent, and value of such deposits cannot be ascertained. A ferry franchise, though, strictly speaking, not real estate, partakes so far of the nature of real estate that it may be partitioned in the same manner as real estate: *Rohn v. Harris*, 130 Ill. 525.

KIMBERLIN v. STATE.

[130 INDIANA, 120.]

OFFICER, RIGHT OF, TO HOLD OVER UNTIL QUALIFIED SUCCESSOR ELECTED. —

Where an officer is lawfully in the possession of an office, under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which he owes his election, or which, by law, is entitled to elect a successor.

VACANCY IN OFFICE DOES NOT OCCUR WHERE PERSON ELECTED DIES BEFORE

HE QUALIFIES. — No vacancy in an office occurs where the person elected to fill it dies before he qualifies, or dies after the polls are closed, and before the result has been ascertained.

APPOINTMENT TO OFFICE VOID WHEN NO VACANCY EXISTS. — An appointment to fill a vacancy in an office in which no vacancy exists is void.

ELECTION HELD AT TIME NOT AUTHORIZED BY LAW, VOID. — The election of a person to an office held at a time which was not authorized by law is void.

M. F. Dunn, G. G. Dunn, and W. K. Marshall, for the appellant.

J. H. Willard, for the appellee.

COFFEY, J. The appellee, William H. Tow, was duly elected trustee of Marion township, Lawrence County, at the regular township election in the year 1888, duly qualified and entered upon the discharge of his duties as such, and is yet in the possession of the office, claiming title thereto.

At the April election in the year 1890, James H. Brown and Henry Murray were opposing candidates for the office of township trustee in Marion township, and after the votes had all been cast and the polls closed, and while the election officers were engaged in counting the ballots, but before the result of the election had been ascertained or declared, Brown suddenly and instantly fell dead. When the count was completed, it was ascertained that Brown had received a majority of the votes cast for township trustee of Marion township. At the November election in the year 1890, the appellant, Hugh L. Kimberlin, and the appellee were opposing candidates for the office of township trustee of Marion township; each took a part in the election, and each voted for himself. The appellant was, by the proper election officers, declared duly elected, and receiving his certificate of election, he qualified and filed his bond as such trustee, to the approval of the county auditor, on the thirteenth day of November of that year. On the seventeenth day of December, 1890, the board of commissioners of Lawrence County, being in special session, entered an order reciting that there was a dispute as to who was elected township trustee of Marion township, and thereupon appointed the appellant as such trustee, but it does not appear that he filed any new bond or took any steps to qualify under this appointment. On the day of this appointment, the auditor of Lawrence County issued to the appellant a warrant for the township funds belonging to Marion township, upon which he drew the funds from the county treasury, whereupon the appellee instituted proceedings in the Lawrence circuit court to enjoin him from acting as such trustee, in which he was successful. The appellant acted as such trustee for the period of five days before he was thus enjoined.

Each of the parties to this suit claims to be the legal trustee of Marion township, the appellant basing his claim upon the election held in November, 1890, and his subsequent appointment by the board of commissioners of Lawrence County, while the appellee bases his claim upon the alleged fact that his successor has never been elected and qualified, and that he has the right to such office until that event takes place.

The questions presented for consideration involve the construction of section 3, article 15, of the state constitution, and some consideration of the provisions of section 5527 of the Revised Statutes of 1881.

Section 3, article 15, of the constitution provides that "whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the general assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."

Section 5527 of the Revised Statutes provides: "If any officer of whom an official bond is required shall fail, within ten days after the commencement of his term of office and receipt of his commission or certificate, to give bond in the manner prescribed by law, the office shall be vacant."

It is contended by the appellant,—1. That the word "election," as used in the constitution and statutes, is not used in its restricted sense, as meaning only an election by the people, but it should be construed as signifying chosen, or designated, and, when so construed, the appellant is entitled to the office in question by reason of his appointment by the board of commissioners of Lawrence County; 2. That Brown was duly elected township trustee of Marion township, at the April election in the year 1890, and having failed to give bond and qualify within ten days after his term of office began, the office, under the provisions of section 5527 of the Revised Statutes became vacant, and the board of commissioners had the legal right to fill such vacancy by appointment.

No authority is cited by the appellant which supports his first position, and we have no knowledge of any such authority; while, on the contrary, the adjudicated cases seem to be harmonious in holding that where one is lawfully in the possession of an office, under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which such incumbent owes his election, or which, by law, is entitled to elect a successor: *Gosman v. State*, 106 Ind. 203; *State v. Lusk*, 18 Mo. 333; *People v. Tilton*, 37 Cal. 614; *Ex parte Lawhorne*, 18 Gratt. 85; *Johnson v. Mann*, 77 Va. 265; *State v. Jenkins*, 43 Mo. 261; *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663.

In view of these authorities, we are not at liberty to adopt the construction contended for by the appellant in this case.

We have no doubt that Brown was duly elected township trustee of Marion township.

When the last vote was cast, and the polls closed, the electors had made their choice, and the count could do nothing more than ascertain the result. The election officers had no power to elect any one after the polls were closed, their duty being confined to ascertaining the result of the balloting, and furnishing the necessary evidence of such result.

But does it follow that because Brown was elected and failed to qualify, the office of township trustee became vacant, and the board of commissioners acquired the right to appoint?

The rule is, that where a person is in the possession of an office, under a constitutional or statutory provision like that found in our constitution, and a successor is duly elected, but dies before he qualifies, no vacancy occurs, since one of the contingencies upon which the incumbent's term of office is to expire has not taken place, namely, the qualification of a successor: *McCrary on Elections*, sec. 314; *Commonwealth v. Hanley*, 9 Pa. St. 513.

Commonwealth v. Hanley, 9 Pa. St. 513, is, in its facts, similar to the case before us.

In that case, Hanley was duly elected clerk of the orphans' court in October, 1845, and was duly commissioned and qualified to serve for the period of three years from the first day of December of that year, and until his successor should be duly qualified. On the second Tuesday of October, 1848, Oliver Brooks was duly elected as his successor, but died before qualifying. The governor, assuming that Hanley's office became vacant at the expiration of three years, appointed a successor.

In discussing the questions arising under these facts, the supreme court of Pennsylvania said: "Being duly qualified in the constitutional sense, and in the ordinary acceptation of the words, unquestionably means that he, the successor, shall possess every qualification; that he shall, in all respects, comply with every requisite before entering on the duties of the office; that in addition to being elected by the qualified electors, he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the constitution of the commonwealth, and

to perform the duties of the office with fidelity. Until all these prerequisites are complied with by his successor, . . . the respondent is *de jure* as well as *de facto* the clerk of the orphans' court."

So, too, this court held in the case of *State v. Berg*, 50 Ind. 496, that where a township trustee was elected his own successor, and did not qualify under his second election, his office did not become vacant, and he was entitled to hold under his first election until a successor was elected and qualified.

The weight of authority is, that where there exists a constitutional provision such as we are now considering, a term of office fixed by statute runs not only for the period fixed, but for an additional period between the date fixed for its termination and the date at which a successor shall be qualified to take the office. The period between the expiration of the term fixed by statute and the time at which a successor shall be qualified to take the office is as much a part of the incumbent's term as the fixed statutory period: *Tuley v. State*, 1 Ind. 500; *Miller v. Burger*, 2 Ind. 337; *Baker v. Kirk*, 33 Ind. 517; *State v. Berg*, 50 Ind. 496; *Gosman v. State*, 106 Ind. 203; *Elam v. State*, 75 Ind. 518; *People v. Whitman*, 10 Cal. 38; *Commonwealth v. Hanley*, 9 Pa. St. 513; *State v. Harrison*, 118 Ind. 434; 3 Am. St. Rep. 663.

It follows from what we have said that the appellee is entitled to the office in dispute, unless the appellant has been legally chosen and qualified as his successor. As we understand the brief of the appellant, it is not seriously contended that the election held in November, 1890, conferred any rights upon the appellant. As the election of a township trustee at that time was wholly unauthorized by law, such election was void, and conferred no right to the office.

Nor did the board of commissioners possess the legal authority to appoint the appellant to the office, for the reason, as we have seen, that there was no vacancy, and there being no vacancy, the appellee's successor could be chosen only by the constituency which elected him.

As to the construction to be placed upon section 5527 of the Revised Statutes, or as to what provisions of that section, if any, conflict with the section of the constitution above set out, we think it unnecessary to inquire in this case, for the reason that the state of facts to which it is applicable does not arise. As Brown died before any certificate of election was issued to

him, and as he did not intentionally abandon the office, this statute is not applicable to the case before us.

As we have reached the conclusion that the law is with appellee, upon the facts above stated the judgment of the circuit court should be affirmed.

Judgment affirmed.

OFFICERS — RIGHT TO HOLD OVER. — An incumbent of an office, who is entitled to hold for a fixed period, and until his successor is elected and qualified, is entitled to hold over in the event of the election of an ineligible successor, and has such interest in the election that he may question its legality by *quo warranto*: *Taylor v. Sullivan*, 45 Minn. 309; 22 Am. St. Rep. 729. Such incumbent holds over as a *de jure* officer until his successor is duly appointed and qualified: *State v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 821. Unless the statute or constitution shows an intention to fix and limit precisely the tenure of an officer, so that at a particular time his authority will cease, the officer is entitled to exercise the functions of his office until another person is qualified to assume them; and where the term of an office is fixed and determinate, a provision requiring the officer to continue "to discharge the duties of his office, although his term has expired, until his successor has qualified," adds an additional, contingent, and defeasible term to the original fixed term, and excludes the possibility of a vacancy, within the appointing power of the governor, except in case of death, resignation, ineligibility, or the like: *People v. Edwards*, 93 Cal. 153. Such a provision applies to one who has held an office during two consecutive terms of two years each, where the act provides that no one shall hold office more than four years out of eight: *State v. Bogard*, 128 Ind. 480; and also to one who has been appointed temporarily by the governor to fill a vacancy: *People v. Tyrrell*, 87 Cal. 475. But the provision is not designed to extend the tenure of office of the incumbent for his advantage; and therefore a person elected to an office, or re-elected as his own successor, cannot, by his neglect to qualify, prolong the term of his predecessor, or his own prior term, and so postpone the beginning of the term for which he was elected: *State v. Duffield*, 50 N. J. L. 43.

VACANCY IN AN OFFICE, WHAT CONSTITUTES. — An office is vacant, within legal intendment, and for all purposes of election or appointment as well, when the official term of the occupant has expired, as in case of his death, resignation, or removal, provided provision is made by law for filling the office by such appointment or election: *State v. Thomas*, 102 Mo. 85; overruling *State v. Lusk*, 18 Mo. 333. The term "vacancy" applies to an existing office without an incumbent, although the office has never before been filled: *In re Election of District Judges*, 11 Col. 373. The mere expiration of the term of an incumbent of an office does not create a vacancy such as the governor alone is authorized to fill by the appointment of a successor: *People v. Tyrrell*, 87 Cal. 475. Nor will the death of a person after his election, but before qualifying, and before the expiration of incumbent's term of office, create a vacancy that the governor can fill by appointment: *Lawrence v. Hanley*, 84 Mich. 399; following *People v. Lord*, 9 Mich. 226. And where an officer continues to discharge the duties of the office after the expiration of his term, and before the qualification of his successor, there is no vacancy in the office, in the absolute sense, nor in any sense, which would authorize

the governor to fill it without the consent of the senate first had: *People v. Edwards*, 93 Cal. 153.

ELECTION ON DIFFERENT DAY FROM THAT PROVIDED BY AN ACT ERECTING a new county, where the county is not organized at the time specified, is void: *Brewer v. Davis*, 9 Humph. 208; 49 Am. Dec. 706.

CITY OF CRAWFORDSVILLE v. BRADEN.

[120 INDIANA, 149.]

POLICE POWER OF STATE. DELEGATION OF, TO MUNICIPAL CORPORATIONS. —

Although the police power primarily inheres in the state, the legislature may delegate a large measure of it to municipal corporations; and the power thus delegated may be conferred in express terms, or it may be inferred from the mere fact of the creation of the corporation.

SPECIFIC ENUMERATION OF CORPORATE POWERS IN STATUTE, EFFECT OF. —

When, in a general statute for the incorporation of cities, there is a specific enumeration of certain powers which would belong to the corporation, without specific enumeration, the specific statute is to be regarded, not as the source of the power, but as a mere declaration of a pre-existing power, or of a power inherent in the very nature of a municipal corporation, and essential to enable it to accomplish the end for which it is created. And the enumeration of powers, including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated.

POWER OF MUNICIPAL CORPORATION TO PRESERVE HEALTH AND SAFETY OF ITS INHABITANTS. — The legislature, by the act authorizing the organization of a municipal corporation, expressly delegates to the municipality the power to preserve the health, safety, and property of its inhabitants.

POWER TO LIGHT STREETS OF CITY, IMPLIED AND INHERENT MUNICIPAL POWER. — The power to light the streets and public places of a city is one of the implied and inherent powers of the municipality, necessary to properly protect the lives and property of its inhabitants, and as a check on immorality.

DISCRETION OF MUNICIPAL CORPORATIONS NOT SUBJECT TO JUDICIAL CONTROL. — The discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen.

POWER TO LIGHT CITY IMPLIES POWER TO SELECT MEANS OF DOING SO. — The power to light the streets and public places of a city carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light.

JUDICIAL NOTICE OF WHAT ELECTRICITY IS. — The courts take judicial notice of electricity and of its nature, but not of the various methods of generating, transmitting, or using it.

LIGHT TO PRIVATE CONSUMERS, MUNICIPALITY MAY FURNISH. — A municipal corporation may establish and maintain works for lighting its streets, and may at the same time furnish the light to the inhabitants, to light their residences and places of business.

RESOLUTION OR ORDINANCE, CITY MAY EMPLOY EITHER, WEEN. — Where a city council has power to act in a given case, and its charter does not prescribe the manner of action, it may accomplish its object by resolution as well as by ordinance.

W. T. Brush, P. S. Kennedy, S. C. Kennedy, T. F. Davidson, and J. West, for the appellants.

B. Crane and A. B. Anderson, for the appellee.

MCBRIDE, J. The question we are required to decide in this case is, Has a municipal corporation in this state the power to erect, maintain, and operate the necessary buildings, machinery, and appliances to light its streets, alleys, and other public places with the electric light, and at the same time and in connection therewith to supply electricity to its inhabitants for the lighting of their residences and places of business? Some other questions are incidentally involved, but the principal controversy is as above stated.

That a city or an incorporated town may buy and operate the necessary plant and machinery to light its streets, alleys, and other public places is not controverted by the appellee, but he denies the right to furnish the light to the individual for his private use. The question is argued on the theory that if the city has such power, it must be by virtue of some express legislative grant, and is not among the implied powers possessed by municipal corporations; that statutes conferring powers upon municipal corporations, especially those involving the exercise of the taxing power, must be strictly construed, and that strictly construed, no statute confers the necessary authority.

The purchase of the necessary land, machinery, and material, and the erection and maintenance of such a plant, do involve the exercise of the taxing power. The necessary funds must be supplied by taxing the tax-payers of the municipality.

The only statute bearing directly upon this question is the act of March 3, 1883: Elliott's Supp., secs. 794 et seq. Section 794 contains the following: "That the common council of any city in this state incorporated either under the general act for the incorporation of cities or under a special charter, and the board of trustees of all incorporated towns of this state, shall have the power to light the streets, alleys, and other public places of such city and town with the electric light, or other form of light, and to contract with any individual or corporation for lighting such streets, alleys, and other

public places with the electric light, or other forms of light, on such terms, and for such times, not exceeding ten years, as may be agreed upon."

Section 795 provides that for the purpose of effecting such lighting the common council of a city, or board of trustees of a town, may provide by resolution or ordinance for the erection and maintenance in the streets, etc., of the necessary poles and appliances.

Section 796 authorizes granting to any person or corporation the right to erect and maintain in the streets, etc., the necessary poles and appliances for the purpose of supplying the electric or other light to the inhabitants of the corporation.

Section 797 validates contracts of a certain character made before the enactment of the statute, and section 798 provides for the appropriation of lands and right of way by corporations engaged in the business of lighting cities or towns, "or the public or private places of their inhabitants, with the electric light," etc.

It will be observed that while section 796 provides for granting to third persons the right to furnish the light to the inhabitants, it does not, in terms, give any such power to the corporation. It will therefore be necessary for us to inquire if the corporation possesses such power independently of the statute, or if not, if the statute is susceptible of a fair construction, in accordance with established rules, which clothes the corporation with such power.

In the case of *Rushville Gas Co. v. City of Rushville*, 121 Ind. 206, 16 Am. St. Rep. 388, this statute was considered, in so far as relates to the right of the city to buy and operate the necessary plant and machinery to light its streets, alleys, and other public places, and it was held that the statute was sufficient to confer that power. In that case, the court, after announcing the conclusion above stated, used the following language: "If there were any doubt as to the meaning of the act, it would be removed by considering it, as it is our duty to do, in connection with the general act for the incorporation of cities, for that act confers very comprehensive powers upon municipal corporations as respects streets and public works, and contains many broad general clauses akin to those which Judge Dillon designates as 'general welfare clauses.' Our own decisions fully recognize the doctrine that municipal corporations do possess, under the general act, authority as broad

as that here exercised, and the operation of that act is certainly not limited or restricted by the act of 1883."

The eminent author above referred to thus defines the powers of municipal corporations: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incident to the powers expressly granted; 3. Those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void": Dillon on Municipal Corporations, 4th ed., sec. 89. Judge Dillon, however, quotes approvingly from the supreme court of Connecticut as follows (sec. 90, p. 147): "All corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And therefore it has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this, they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation": *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475 (501).

This principle has been repeatedly recognized by this court. Thus in *Smith v. City of Madison*, 7 Ind. 86, it is said: "The strictness then to be observed in giving construction to municipal charters should be such as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessarily implied, in order to the complete exercise of the powers granted."

Again, in *Kyle v. Malin*, 8 Ind. 34 (37), the court said: "The action of municipal corporations is to be held strictly within the limits prescribed by statute. Within these limits they are to be favored by the courts. Powers expressly granted or necessarily implied are not to be defeated or impaired by a stringent construction."

Among the implied powers possessed by municipal corporations in this state are those grouped under the somewhat comprehensive title of "police powers," — a power which it is difficult either to precisely define or limit; a power which authorizes the municipality in certain cases to place restrictions upon the power of the individual both in respect to his personal conduct and his property, and also furnishes the only authority for doing many things not restrictive in their character, the tendency of which is to promote the comfort, health, convenience, good order, and general welfare of the inhabitants.

The police power primarily inheres in the state; but the legislature may, and in common practice does, delegate a large measure of it to municipal corporations. The power thus delegated may be conferred in express terms, or it may be inferred from the mere fact of the creation of the corporation. The so-called inferred or inherent police powers of such corporations are as much delegated powers as are those conferred in express terms, the inference of their delegation growing out of the fact of the creation of the corporation, and the additional fact that the corporation can only fully accomplish the objects of its creation by exercising such powers.

Special charters, as well as general statutes for the incorporation of cities and towns, usually contain a specific enumeration of powers granted to and which may be exercised by such corporations. In many cases the powers thus enumerated are such as would be implied by the mere fact of the incorporation.

When powers are thus enumerated in a statute which would belong to the corporation without specific enumeration, the specific statute is to be regarded, not as the source of the power, but as merely declaratory of a pre-existing power, or, rather, of a power which is inherent in the very nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. And the enumeration of powers, including a portion of those usually implied, does not necessarily operate as a limitation of corporate pow-

ers, excluding those not enumerated: *Clark v. City of South Bend*, 85 Ind. 276; 44 Am. Rep. 13; *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St. Rep. 185.

The corporation, notwithstanding such enumeration, still possesses all of the usually implied powers, unless the intent to exclude them is apparent, either from express declaration or by reason of inconsistency between the specific powers conferred and those which would otherwise be implied. The legislature can unquestionably take from municipal corporations powers which would inferentially be conferred upon them by their creation, or it can restrict the exercise of such powers, or in any manner control their exercise, the legislative will being as to such matters supreme.

Among the implied powers possessed by municipal corporations is the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life, and property.

Thus in this state, it has been held that, independently of any statutory authority, such corporations possess the inherent power to enact ordinances for the protection of the property of its citizens against fire: *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830; *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St. Rep. 185; *Hasty v. City of Huntington*, 105 Ind. 540; *Clark v. City of South Bend*, 85 Ind. 276; 44 Am. Rep. 13; *Corporation of Bluffton v. Studabaker*, 106 Ind. 129.

This power will not only authorize the enactment and enforcement of ordinances establishing fire limits, regulating building and repairing buildings, and regulating the storage and traffic in inflammable or explosive substances, but the purchase of apparatus for extinguishing fires and furnishing a supply of water: *Corporation of Bluffton v. Studabaker*, 106 Ind. 129.

In the case of *City of St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89, the supreme court of Minnesota, after holding that a municipal corporation is "a creature of the statute, and in the exercise of its authority cannot exceed the limits therein prescribed," says: "It is a body of special and limited jurisdiction; its power cannot be extended by intendment or implication, but must be confined within the express grant of the legislature"; and then says further: "Incidental to the ordinary powers of a public municipal corporation, and necessary to the proper exercise of its functions, is the power of enacting sanitary regulations for the preservation of the lives and health of those residing within its corporate limits." If

this statement is correct, it follows, that to concede to municipal corporations the possession of such powers does not involve any extension, either by intendment or implication, of the powers expressly conferred by statute, but that by the act authorizing the organization of the corporation the legislature expressly delegates to the municipality the power to take such steps as are necessary to preserve the health and safety (and we will add the property) of its inhabitants. The inference of the delegation of such powers follows inevitably and irresistibly, because their exercise is necessary to the accomplishment of the objects of the incorporation.

Where a municipal corporation attempts to exercise any of the powers thus implied, or inferentially conferred, it is within the rule of *Kyle v. Malin*, 8 Ind. 34, as fully as it is when attempting to exercise those powers the warrant for which is found in the express letter of its organic law. It is to be favored by the courts, and such powers are not to be defeated or impaired by a stringent construction.

It is, of course, important and necessary to know in each case that the power claimed is in fact included in the implied powers of the corporation.

There can be little or no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. This is forcibly set forth by Judge Dillon, in his work on municipal corporations, as follows: "In a most important particular, however, Rome suffers by comparison with modern cities. Its public places were not lighted. All business closed with the daylight. The streets at night were dangerous. Property was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches. . . . No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay, of the state of a great city buried in the darkness of night; and they show how clearly the power to provide for this is essentially and peculiarly one pertaining to municipal rule and regulation. Nor are these studies, and the facts that they reveal, without practical value to the jurist. They demonstrate that a large and dense collection of human beings occupying a limited area have needs peculiar to them-

selves, which create the necessity for municipal or local government and regulation, and this, in its turn, the necessity for corporate organization. The body thus organized, as it has duties, so it acquires rights peculiar to itself as distinguished from the nation or state at large": Dillon on Municipal Corporations, 4th ed., sec. 3 a.

While Judge Dillon's remarks have, of course, special reference to great cities, the difference in that respect between the greater and the minor municipal corporations is a difference in degree, and not in kind. Wherever men herd together in villages, towns, or cities will be found more or less of the lawless or vicious; and crime and vice are plants which flourish best in the darkness.

So far as lighting the streets, alleys, and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and the financial condition of the corporation.

It is well settled that the discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen: *City of Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416; 15 Am. & Eng. Ency. of Law, 1046, and authorities cited.

We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. The only authority cited which holds a contrary doctrine is that of *Spaulding v. Inhabitants of Peabody*, 153 Mass. 129.

We are, however, unable to recognize the validity of the reasoning in that case. We are unable to see the analogy between the city of Boston, because authorized to light its streets, engaging in whale-fishing to procure oil for that purpose, or the other supposed cases, and the generation and supply of electricity.

Electricity is not a commodity which can be bought in

the markets, and transported from place to place, like oil. We take judicial notice of the laws of nature, and of nature's powers and forces, and therefore take judicial notice of that which is known as electricity, and of its properties; not, of course, of the various methods of generating and transmitting or using it, but of the thing itself, and of its nature. As in many other cases, here the judicial presumption outruns the fact, and we are supposed to know, and to take judicial notice of more than we can in fact know in the present state of scientific knowledge. We must know, however, that it cannot be generated and transported from place to place as we can procure and transport oil, clothing, etc., and that it can only be conveyed from the place where it is generated to where it is needed for lighting the streets, or to the numerous inhabitants of a city, so as to enable them to use it as a general illuminant, by invoking and exercising the power of eminent domain.

The corporation possessing, as it does, the power to generate and distribute throughout its limits electricity for the lighting of its streets and other public places, we can see no good reason why it may not also, at the same time, furnish it to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health. It is averred in the complaint that the light which the city proposes to furnish for individual use is the incandescent light. Here, again, is a fact of which we are authorized to take judicial knowledge. A light thus produced is safer to property and more conducive to health than the ordinary light. Produced by the heating of a filament of carbon to the point of incandescence in a vacuum, there is nothing to set property on fire, or to consume the oxygen in the surrounding air, and thus render it less capable of sustaining life and preserving health.

But little authority has been cited bearing on the precise question, and we have been able to find but little. The case of *Mauldin v. City Council of Granville*, 33 S. C. 1, has been cited by the appellee. That was, like this, a suit by tax-payers of the city of Granville to restrain the city council from purchasing and operating an electric-light plant to light the streets and public buildings of the city, and from using it for lighting private residences. In that case the court says: "The city has the express power to own property, and it also has the implied right to light the city. . . . Considering

that some discretion as to the mode and manner should be allowed the municipality in carrying out the conceded power to light the streets of the city, we hold that the purchase of the plant was not *ultra vires* and void, so far as it was designed to produce electricity suitable for and used in lighting the streets and public buildings of the city." The court, however, denied the right to furnish the light to the individual citizen, on the ground that to do so would be entering into private business outside of the scope of the city government. The court refers to the lack of authority on the precise question, and that it is largely a question of first impression without authority.

The case of *Thomson-Houston Electric Co. v. City of Newton*, 42 Fed. Rep. 723, was a suit to enjoin the city of Newton from purchasing and operating an electric-light plant and furnishing the light to the inhabitants. The only statutory authority claimed by the city is as follows: "To establish and maintain gas-works or electric-light plants, with all the necessary poles, wires, burners, and other requisites of said gas-works or electric-light plant": Acts 22 Gen. Assem. Iowa, 16.

It will be observed that this statute does not, in terms, confer any power not, in our opinion, as above stated, included among the implied powers of municipal corporations. The court says: "It is also urged that the city has only the authority to erect an electric plant for the purpose of lighting the streets and public places of the city, and is not authorized to furnish lights for use in the houses and stores of its citizens. . . . It has been the uniform rule that a city, in erecting gas-works or water-works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric-light plants in the same category."

The case of *Smith v. Nashville*, 88 Tenn. 464, is also in point as to the principle involved. The charter of the city of Nashville contained the following in its enumeration of the powers conferred upon the city: "To provide the city with water by water-works, within or beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies."

Acting under the authority thus conferred, the city established water-works, and in addition to making provision for the extinguishment of fires, it furnished water to the citizens.

The right to do this was disputed, and formed the principal subject of controversy. The court said: "Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants; nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all men can be furnished, in a populous city, only through the instrumentality of well-equipped water-works. Hence, for a city to meet such a demand is to perform a public act and confer a public blessing. It is not a strictly governmental or municipal function which every municipality is under legal obligation to assume and perform, but it is very close akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law. . . . It is the doing of an act for the public weal, — a lending of corporate property to a public use. . . . It cannot be held that the city, in doing so, is engaging in a private enterprise, or performing a municipal function for a private end."

While the authorities, on the precise question, are meager, we think the weight of authority, as well as of reason, tends to sustain the right of the municipality, through its proper officers, acting in the exercise of a sound discretion, to furnish light as well as water to its inhabitants, not only in its public places, but in their private houses and places of business.

An additional question is presented and discussed. It is shown by the averments of the complaint that such action as the city authorities have taken, and are proposing to take, is by virtue of a resolution adopted by the city council, and not by virtue of an ordinance, and that if the city is authorized to erect and operate an electric-light plant, it can only do so by virtue of an ordinance duly enacted.

In so far as the city derives any authority from the act of March 3, 1883 (Elliott's Supp., secs. 794 et seq.), it is authorized to act either by resolution or ordinance; but aside from the statute, where the city council has power to act in a given case, and its charter does not prescribe the manner of action, it may accomplish its purpose by resolution as well as by ordinance: Note to *Robinson v. Mayor etc.*, 34 Am. Dec. 625, and authorities there cited.

The court erred in overruling the demurrer to the complaint. The cause is reversed, at the costs of the appellee, with instructions to the circuit court to sustain the demurrer.

MUNICIPAL CORPORATIONS — GENERAL AND SPECIAL POWERS. — Municipal corporation possesses, in addition to the powers specifically conferred upon it by its charter, such further powers as are necessarily incident to or may be fairly inferred from those powers, including all that are essential to the declared objects of its existence: *Village of Carthage v. Frederick*, 122 N. Y. 283; 19 Am. St. Rep. 490. A general power granted to the corporation to pass all ordinances necessary for the welfare of the corporation is qualified and restricted by those other clauses and provisions of the charter which specify particular purposes for which ordinances may be passed: See note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 629. Where both general and special powers are granted by the act of incorporation, the power to pass by-laws or ordinances relating to health and sanitary matters under the special or express grant can only be exercised in the cases and to the extent, as respects those matters, allowed by the act: *Huessing v. Rock Island*, 128 Ill. 465; 15 Am. St. Rep. 129. See further, in regard to this subject, the note to *Williams v. Citizens' Railway Co.*, ante, p. 205.

JUDICIAL NOTICE, OF WHAT MUST BE TAKEN: See notes to *Lanfear v. Mestier*, 89 Am. Dec. 663-697, and *Temple v. State*, 49 Am. Rep. 201-207.

MUNICIPAL CORPORATIONS, POWER OF, TO FURNISH LIGHT. — In 1890, the Massachusetts house of representatives submitted to the justices of the supreme court the question whether it was within the constitutional power of the legislature to confer upon cities and towns within the commonwealth the power to manufacture gas or electric light for use in the public streets and buildings, and to manufacture gas or electric light for the purpose of selling the same to its own citizens. The question thus propounded did not raise quite the same point as that under review in the principal case, but as the opinion of the justices (which will be found in 150 Mass. 592) involved the determination of the question whether the furnishing of gas and electricity for illuminating purposes is a "public service," it is plain that the discussion would proceed upon lines somewhat similar to those followed in the opinion of the Indiana court. In view of the paucity of authorities directly in point, some extracts from the opinion of the Massachusetts judges may with advantage be given, for the purpose of illustrating the subject. After referring to the impossibility of defining with entire accuracy all the characteristics which distinguish a public service and a public use from services and uses which are private, they mention with approbation the statement in *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39, that a service, to be public, must affect the inhabitants "as a community, and not merely as individuals." On this ground the outlay of money for the purpose of protecting the property of citizens from fire was, in the early case of *Allen v. Taunton*, 19 Pick. 485, held to be properly a municipal expense. The same principle applied to the maintenance of sewers and drains. The opinion then proceeds as follows: "The furnishing of water for cities and towns for domestic use affords perhaps the nearest analogy to the subject we are considering. It was long ago declared that the supply of a large number of inhabitants with pure water is a public purpose. . . . Water cannot ordinarily be supplied to a large city or town from ponds or streams without the exercise of eminent domain and the use of the public ways; every inhabitant needs water, and often the only practicable method of obtaining it is by the agency of corporations or of the municipality. . . . Artificial light is not perhaps so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of

gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or the municipality, and it cannot be distributed without the use of the public streets, or the exercise of the right of eminent domain. It is not necessarily an objection to a public work maintained by a city or town, that it incidentally benefits some individuals more than others, or that, from the place of residence, or for other reasons, every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree, whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But, in general, it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to municipal control, when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others, as well as himself, should possess and enjoy them." It will be observed that the ground upon which the power of the legislature to authorize a municipal corporation to furnish light to individual citizens is here based is, that the service is a public one. There would seem to be no reason why this doctrine should not be applied to the facts under review in the principal case. The power of a municipal corporation to "light streets, alleys, and other public places" might fairly be construed as carrying with it the implied power to supply all public needs in regard to the supply of light; and if it is once granted that the supply of light to private citizens is a "public service," we readily arrive at the conclusion of the court in the principal case. So far as the capacity of the corporation for supplying the light is concerned, the supply of light to a private house would, according to the principles set forth in the opinion of the Massachusetts justices, be no less a "public service" than the supply of light to a city hall or a court-house.

A CITY CANNOT ACCOMPLISH BY AN ORDER that which, under its charter, can be done only by an ordinance: *Trenton v. Coyle*, 107 Mo. 194. A city council can only execute power conferred upon it by statute in the way in which all its powers are executed by adopting an ordinance prescribing the officer by whom and the manner in which the objects of the law should be accomplished: *Mayor etc. of Baltimore v. Porter*, 18 Md. 284; 79 Am. Dec. 686; *Zottmann v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96. A power conferred upon a city council "to erect lamps and provide for lighting the city," and "to create, alter, and extends lamp districts," was held to require the exercise of judgment and discretion, and not proper to be delegated to a committee of the council, so that the determination of the committee should be final, either as to establishing new lamps, or discontinuing those already established: *Minneapolis Gas Light Co. v. Minneapolis*, 36 Minn. 159.

LAMB v. LAMB.

[180 INDIANA, 278.]

ANTENUPTIAL CONTRACT PROCURED BY FRAUD SET ASIDE WHEN. — When an intended husband, by misrepresentation, deception, and undue advantage, fraudulently induces his intended wife to execute an antenuptial contract, she may, after the marriage, and before his death, have such contract set aside; and she has the right to prove his misconduct after marriage, for the purpose of showing that her act in bringing the suit was not premature.

C. L. Jewett and H. E. Jewett, for the appellant.

D. C. Anthony, for the appellee.

ELLIOTT, C. J. The appellant alleges in her complaint that she and the appellee entered into a contract of marriage; that the appellee obtained a controlling influence over her, and secured her confidence; that, well knowing the influence he possessed over her, the appellee falsely represented to her "that in order to satisfy his grown-up sons of the propriety of his marriage to her, and to reconcile them thereto, and enable him and her to live in peace after their marriage, it would be necessary for them to execute a paper which would satisfy the defendant's children, but that the paper would not have the effect to deprive her of any of her rights as his wife or as his widow"; that, "notwithstanding such paper to be so executed by them, she would receive more than twenty-three thousand dollars in stocks, moneys, and bonds"; that "in furtherance of his fraudulent design, the defendant represented to the plaintiff that he would take her to a good lawyer in New Albany, who would act for her, and advise her in the matter; that the defendant thereby induced her to go to the office of his own attorney and legal adviser, where, in the presence of the defendant, plaintiff was assured that the paper was all right, and as represented by the defendant; that relying upon such representations, and not knowing or understanding the legal effect of the paper, but believing that it was only intended to satisfy defendant's children, and without any intention to relinquish her rights, the plaintiff, in ignorance, not only of the legal effect of such paper, but also of the contents thereof, joined the defendant in the execution, in duplicate, of a written instrument," which reads thus: "This agreement, made this twenty-first day of August, 1884, between Josiah Lamb of the first part, and Jane Lamb of the second, witnesseth, that whereas marriage is intended to be had between

the parties, and whereas the party of the first part is the owner of large real and personal estate, and to the end that distribution of his said estate may now be settled so far as the party of the second part is concerned, should he die first, — now, therefore, in consideration of the payment of the sum of one dollar by the party of the first part to the party of the second part, the receipt whereof is hereby acknowledged, and of the relinquishment by the party of the second part of all her rights, title, and interest in and to the estate, real and personal, of the party of the first part, allowed by law, the party of the first part hereby agrees to give, and does give, to the party of the second part, to have and hold as her own separate property, absolutely, out of the estate of the party of the first part, should she survive him, the following personal property." The instrument concludes with a description of the personal property. The complaint, after setting forth the agreement we have copied, avers that the property described in the agreement was of the value of two hundred dollars, and that the value of the appellee's personal estate was more than forty thousand dollars; that the parties married, and for a time lived and cohabited as husband and wife. The complaint contains many allegations concerning the appellee's conduct and behavior after marriage, but these we regard as at present immaterial, since the immediate question is, whether the antenuptial contract is voidable upon the ground of fraud, and the appellee's conduct after marriage does not affect that question. We shall, however, consider the effect of the appellee's conduct subsequent to marriage at another place.

If the only fraud on the part of the appellee was in misrepresenting the legal effect of the written contract, there could be no recovery in this case unless the situation and relationship of the parties are such as to take the case out of the ordinary rule. It is established law that where parties deal at arm's-length in respect to ordinary business matters, the false representation of the legal effect of a written instrument will not constitute fraud. But the rule that the false representation of the legal effect of a written instrument will not constitute actionable fraud does not, by any means, apply to all cases; on the contrary, there are very many cases over which it does not extend: *Townsend v. Cowles*, 31 Ala. 428; *Peter v. Wright*, 6 Ind. 183; *Kline v. Kline*, 57 Pa. St. 120; 98 Am. Dec. 206; *Rockafellow v. Newcomb*, 57 Ill. 186. The question here is, whether the rule extends over a case where par-

ties occupy a relationship such as that which existed between the appellant and the appellee. We think it clear that it does not.

But there was here more than the misrepresentation of the legal effect of an instrument: there was deception, and undue advantage was taken of an ignorant woman by one who had obtained her confidence. There was deception in pretending to take the woman to an attorney who could act as her adviser and protect her interests as his client, but in fact taking her to the attorney of the defendant, who was under a duty to him, and could not be the confidential adviser of one whose interests were adverse to his. There was undue advantage taken in putting the woman off with property so grossly disproportionate in value to the estate of her intended husband, and in violating the duty the defendant was under to make no untruthful representations. We think it sufficient to quote the statements of authors of good standing, without collecting the cases, for we are satisfied that they correctly state the law. One of these statements is found under the head of "Confidential Relations," and is this: "Undue influence may easily be exercised under the intimate relation created by an engagement to marry. In the case, e. g., of a marriage settlement of the intended wife's property, drawn up by the intended husband, it is the duty of the latter to explain the provisions of the deed in unmistakable terms, and to give due opportunity to the lady for deliberation; failing which she may, on the husband's death, if not before, have the settlement annulled. Again, if a woman give a man land upon a promise of marriage, and he then refuse to marry her, and continue to hold the land, this is a fraud for which the law will give the woman proper relief. So, on the other hand, if a man should, after much solicitation and hesitancy, convey land without adequate pecuniary consideration to a woman who had promised to marry him, and who had thereby gained great influence over him, her refusal to marry him would afford him ground for rescinding the conveyance": 1 Bigelow on Fraud, 351. Another statement of the law is: "Owing, moreover, to the confidential relation which subsists between the parties, an antenuptial contract which appears to have been unfairly procured will be set aside": Schouler on Domestic Relations, sec. 183.

* The decision in the case of *McNutt v. McNutt*, 116 Ind. 545, does not control this case, nor is it at all relevant, except upon

the single question of consideration. In that case no element of fraud on the part of the husband entered into the case as there considered and decided. Here, consideration is not a controlling element, but is a fact to be considered, in connection with other facts, upon the question of fraud.

We think that the appellant has a right to show the misconduct of the husband after marriage, not for the purpose of showing that the antenuptial contract was procured by fraud,— upon that question it exerts no influence whatever,— but for the purpose of showing that the act of the wife in bringing suit was not premature.

Judgment reversed.

ANTENUPTIAL CONTRACTS. — The relation of persons betrothed is one of unbounded confidence, especially on the part of the woman. Such persons cannot be regarded as in the same category with buyers and sellers, or as dealing with each other at arm's-length: *Kline v. Kline*, 57 Pa. St. 120; 98 Am. Dec. 206. Antenuptial agreements are severely scrutinized by the courts; and owing to the confidential relations of the parties, it seems that the presumption is against their validity, and that the burden of proof is on the husband to prove the perfect fairness of the transaction: *Pierce v. Pierce*, 71 N. Y. 154; 27 Am. Rep. 22, and note (in which the state of facts was not unlike that in the principal case). For a case in which the evidence was held sufficient to warrant a finding that an intending wife was induced to sign the contract by a fraudulent misrepresentation as to its contents, see *Peaslee v. Peaslee*, 147 Mass. 171. So where a widow induced a man to marry her on her oral promise that the proceeds of her land should go to their support after marriage, and about eighteen months after the marriage delivered to her daughters by her former marriage deeds of the land, for the consideration of love and affection only, which she had executed, without the knowledge or consent of her husband, just on the eve of her marriage, it was held that the husband might maintain an action during the life of the wife to set the deeds aside: *Green v. Green*, 34 Kan. 740; 55 Am. Rep. 256. For two cases in which it was held that the wife could not repudiate an antenuptial settlement, by which she had relinquished all her future interest in his estate, see *Neely's Appeal*, 124 Pa. St. 406; 10 Am. St. Rep. 594; *Kesler's Estate*, 143 Pa. St. 386; 24 Am. St. Rep. 557.

BACKER v. PYNE.

[120 INDIANA, 283.]

FALSE REPRESENTATION AS TO FACT CONTAINED IN PUBLIC RECORD MAY BE RELIED UPON. — A false representation made for a fraudulent purpose may be relied upon by the party to whom it is made, although the representation is of a fact contained in a public record.

NOTICE OF FACTS EXHIBITED IN PUBLIC RECORD, PARTIES BOUND TO TAKE. — Parties are bound, in the absence of fraud, to take notice of facts exhibited in a public record.

SUBROGATION, PERSON WHO ADVANCES MONEY TO DISCHARGE LIENS ENTITLED TO, WHEN. — Where a debtor, by fraudulent representations, induces a person to advance money to pay off liens on the debtor's property to redeem the debtor's property from execution sale, and to release a judgment of his own against the debtor which was a lien on the debtor's property, such person will, as against the debtor, be subrogated to the rights of the persons whose liens his money discharged.

VOLUNTEER, ONE WHO ADVANCES MONEY TO PAY OFF LIENS IS NOT. — A person who, in order to protect his own interest, advances money to pay off liens, is not a volunteer.

LIEN KEPT ALIVE WHERE EQUITY REQUIRES IT. — A lien will be kept alive where equity requires it, and the parties intended that it should not be extinguished.

SUBROGATION, DOCTRINE OF, APPLICABLE, THOUGH RIGHTS OF THIRD PERSONS INTERVENE, WHEN. — Where a mortgagee, induced by the fraudulent representations of the mortgagor that his mortgage would thereby become the senior lien, pays money to remove prior liens on the property, he is entitled to be subrogated to the rights of the holders of such prior liens, as against a person whose lien is prior to the lien of the mortgage, but junior to the liens satisfied.

REDEMPTION, LAST DAY FOR, FALLING ON SUNDAY. — Where the last day for redemption is Sunday, it may be made on the next day.

COMPUTATION OF TIME WITHIN WHICH REDEMPTION CAN BE MADE. — In computing the time within which redemption from a sheriff's sale can be made, the day of the sale must be excluded.

W. Henning, A. Gilchrist, and C. A. De Bruler, for the appellant.

C. H. Mason and S. K. Connor, for the appellees.

ELLIOTT, C. J. The complaint of the appellee states these material facts: On the twelfth day of May, 1888, the appellee recovered judgment against John B. Friedl for \$1,307. At the time the judgment was recovered there were several other judgments against Friedl prior to that recovered by the appellee. One of the prior judgments was in favor of John Richardt. On this judgment an execution was issued, and the real estate in controversy sold. John T. Patrick bought the land from the purchaser at the sale and received a certifi-

cate from the sheriff. On the twenty-second day of June, 1888, Friedl asked the appellee to assist him in paying the lien acquired by Patrick, and falsely and fraudulently represented to him that his judgment and the lien of Patrick were the only liens on the land, except a judgment in favor of Sarah Cooper and one in favor of Joshua H. Grover. The appellee consented to advance the money required to redeem the land from the sale made to Patrick on the Richardt judgment, and Friedl agreed to execute a mortgage to secure the appellee. The money was advanced and the mortgage executed. The land was redeemed from the sale made to Patrick on the Richardt judgment, and Friedl received from the clerk a certificate of redemption. Relying upon the representations of Friedl, the appellee entered satisfaction of the judgment in his favor against Friedl. He received no consideration for such entry of satisfaction except the promise, and the mortgage executed by his debtor. After the entry of satisfaction the appellee learned that the appellant held an unsatisfied judgment against Friedl, amounting to fifteen hundred dollars. The appellant claims that he is the holder of a deed from the sheriff executed pursuant to a sale made upon his judgment, and that his rights and interests are paramount to those of the appellee. On the tenth day of June, 1889, the redemption was made from the sale to Patrick, that day of the week being Monday. The judgment on which the sale to Patrick was made was rendered on the third day of May, 1887; the Beilefield judgment was rendered on the thirteenth day of the same month; the appellant's judgment was rendered on the eighth day of July, 1887, and the appellee's judgment was rendered on the twelfth day of May, 1888.

It appears from our synopsis of the complaint that the lien of the Richardt judgment is the paramount one, and the sale to Patrick the senior sale, so that if the appellee succeeded to the rights of Patrick he has a senior lien; and if he has such a lien, the rights of the appellant ought, in equity and good conscience, to yield to his senior lien. If the equities of the appellee are strong enough to entitle him to subrogation as against the appellant, equity will decree subrogation, and remove all obstacles to its effective operation.

If the question were confined to Friedl, the judgment debtor, and the appellee, the case would be entirely free from difficulty. There can be no doubt that the representations of Friedl were fraudulent, nor can there be any doubt that the

appellee had a right to rely on them. It is established law that a false representation made for a fraudulent purpose may be relied upon by the party to whom it is made, although the representation is of a fact contained in a public record: *Campbell v. Frankem*, 65 Ind. 591; *Dodge v. Pope*, 93 Ind. 480 (486); *Ledbetter v. Davis*, 121 Ind. 119; *Fisher v. Tuller*, 122 Ind. 31 (34); *Bristol v. Braidwood*, 28 Mich. 191.

If the appellee and the judgment debtor were here the only litigants, we should not have the slightest hesitation in adjudging that as the false representations of the debtor induced the appellee to advance the money, pay the liens, redeem the property, and satisfy his own judgment, the latter is entitled to subrogation to the rights of the persons whose liens his money went to pay: *Shattuck v. Cox*, 128 Ind. 293; *Lowrey v. Byers*, 80 Ind. 443. What fraud creates, equity will destroy; and as the fraud of the debtor is the only obstacle that bars the appellee's way to a complete right under his mortgage, equity would destroy that obstacle, if the author of the fraud were the only person interested. But the appellant is an interested party, and he is not connected with the fraud of the judgment debtor. It is because his interests are involved, and not because those of the debtor are affected, that the case is one of some difficulty.

The appellant possessed rights under his judgment, and of those rights the appellee was chargeable with notice. Parties are bound, in the absence of fraud, to take notice of the facts exhibited in a public record: *Taylor v. Morgan*, 86 Ind. 295; *Caley v. Morgan*, 114 Ind. 350. We must therefore consider and decide this case upon the theory that the appellee had notice of the rights of the appellant, in so far as they were disclosed by the record.

The rights of the appellant under his judgment were subordinate to those of the holder of the Patrick claim, so that if the appellee is subrogated to the rights of Patrick, he necessarily possesses the senior right. We think he is subrogated to those rights. He was in no sense a volunteer; for he had his own judgment, which gave him an interest he had a right to protect, and, moreover, he advanced money to pay off liens upon the faith of the debtor's representations. The money he advanced was used to pay off liens, and it was their payment that lets in the lien of the appellant, if it can come in at all. If the sale on the Richardt judgment had not been vacated, it would have completely cut off all junior liens. It

is clear that there was a right to pay subsisting liens, that the appellee believed that he was protecting his own interests by paying them, and that there was no intention on his part to extinguish any prior lien, so as to let in junior liens, such as that of the appellant. If the prior lien is not extinguished, it exists in some person; and that person must be the appellee, for he advanced the money which paid it, but he did not advance it to extinguish the lien. On the contrary, he advanced the money with the intention of protecting an interest that he had a right to protect, and his equities are superior to those of the appellant. He does not displace or crowd out the lien of the appellant, for he can only secure the senior lien by his right of subrogation to the lien of Patrick, which is the paramount one. His own judgment does not mount above that of the appellant. It is a familiar principle of equity jurisprudence that a lien will be kept alive, where equity requires it, and the parties intended that it should not be extinguished: *Troost v. Davis*, 31 Ind. 34; *Hanlon v. Doherty*, 109 Ind. 37; *Strohm v. Good*, 113 Ind. 93; *Elston v. Castor*, 101 Ind. 426; 51 Am. Rep. 754; *Hewitt v. Powers*, 84 Ind. 295; *Smith v. Ostermeyer*, 68 Ind. 432; *Howe v. Woodruff*, 12 Ind. 214.

The doctrine of subrogation is applicable here, notwithstanding the fact that the rights of a third person have intervened. Here the third person has in no respect changed position; he has done nothing upon the faith of the acts performed by the party who invokes the doctrine of subrogation. He holds the same debt and the same security that he held before the appellee acted in the matter. His claim is, that he occupies a better position than he would have done had there been no redemption from the Patrick sale. He asks to profit by the acts of another, who believed that he was protecting his own interests and preventing the sacrifice of property by advancing money to his embarrassed debtor. Clearly, the right of subrogation existed as against the debtor, and the position of the appellant, although he is a third person, is not such as to defeat the right: *Payne v. Hathaway*, 3 Vt. 212. The money was paid by the appellee under the belief that his mortgage became the senior lien, and he is entitled to seize whatever liens he paid that will protect him from the claims of persons whose liens are junior to those he paid: *Sidener v. Pavey*, 77 Ind. 241; *Johnson v. Barrett*, 117 Ind. 551; 10 Am. St. Rep. 83; *Morrow v. United States etc. Co.*, 96 Ind. 21; *Bodkin v.*

Merit, 102 Ind. 293; *Weiss v. Guerineau*, 109 Ind. 438; *Cockrum v. West*, 122 Ind. 372; *Erwin v. Acker*, 126 Ind. 133. The appellee did not therefore redeem simply as a judgment creditor or mortgagee, but in the capacity of owner; for the advancement of the money to the owner for that specific purpose, and the use of it for that purpose by him, entitle the appellee to full subrogation to his rights. But having redeemed, all his rights as a lien-holder attach, and may be enforced. The redemption, it is true, was directly made by the judgment debtor, but it was made with the money advanced to him by the appellee for that purpose, and one of the principal reasons for advancing the money was to give seniority to the appellee's mortgage, so that the redemption inured to the benefit of the appellee. The authorities to which we have referred sustain this conclusion, and it is sustained by other decisions. It is sustained by the cases which hold that where money is loaned to an infant, and he uses it in buying necessities, the lender is subrogated to the rights of the seller of these articles: *Price v. Sanders*, 60 Ind. 310; *Conn v. Coburn*, 7 N. H. 368; 26 Am. Dec. 746. It is sustained by the cases which hold that where a party is compelled to pay a bond executed by an officer, he is subrogated to the rights of the state or nation to whom the bond was executed: *Hunter v. United States*, 5 Pet. 173; *Robertson v. Trigg*, 32 Gratt. 76. It is sustained by the many cases which hold that where one pays off a senior mortgage upon a representation of the mortgagor that it is the only lien on the land, he is entitled to subrogation to the rights of the mortgagee: *Sidener v. Pavey*, 77 Ind. 241, and authorities cited.

The complaint states facts entitling the plaintiff to some relief, and such a complaint is good against a demurrer, so that we need not inquire whether it does or does not entitle the appellee to all the relief prayed: *Bayless v. Glenn*, 72 Ind. 5.

Counsel on both sides assume that the question as to the correctness of the ruling denying a new trial is before us, and we shall so treat it, although it very clearly appears from the assignment of errors that no such question is presented.

The only point that we need give attention in considering the ruling denying the motion for a new trial is that made by appellant's counsel as to the rule for computing the time for redemption. Their contention is, that as the sale was made on the ninth day of June, 1888, and the money was paid

to the clerk and a right to redeem asserted on the tenth day of June, 1889, the attempt was ineffective. As the ninth day of June, 1889, fell on Sunday, the redemption was well made on the Monday following, provided a redemption on Sunday, the 9th, would have been effective. Where the last day for redemption is Sunday, it may be made on the next day: Rev. Stats. 1881, sec. 1280; *Hogus v. McClintock*, 76 Ind. 205.

It is contended, however, that the year for redemption expired on the eighth day of June, 1889, and that a redemption on the ninth day of that month would not have been sufficient. We think it clear that the statutory rule for the computation of time governs the case, and under that rule the day of the sale must be excluded. Our decisions have applied the rule to all cases affecting matters of statutory procedure: *State v. Thorn*, 28 Ind. 306; *Towell v. Hollweg*, 81 Ind. 154; *English v. Dickey*, 128 Ind. 174. The decision in *Liggett v. Firestone*, 96 Ind. 260, was not directed to the question of the rule for the computation of time; the only question there decided was that the year for redemption did not begin to run until the payment of the bid by the purchaser at the sheriff's sale. What was there said is to be understood as addressed to the question there under investigation, and thus understood, it does not affect the question here under consideration.

Judgment affirmed.

RECORDS—PARTIES CHARGED WITH FACTS CONTAINED IN.—One purchasing land is charged with constructive notice of such entries in the reception-book or index in the registrar's office as are by law required to be made: *Ahern v. Freeman*, 46 Minn. 156; 24 Am. St. Rep. 206. A recorded judgment concerning land is notice to subsequent purchasers, in the absence of fraud or misrepresentation, and equity will not relieve against negligence in failing to examine the record: *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 48. Purchasers of land are deemed to have notice of every fact disclosed by the record affecting their title, and every other fact which an inquiry suggested by the record would have led up to: *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826, and note; *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295, and note; *Craig v. Leiper*, 2 Yerg. 193; 24 Am. Dec. 479. For a full discussion of implied or constructive notice, see note to *Parker v. Conner*, 45 Am. Rep. 184.

SUBROGATION—WHO ENTITLED TO.—Mortgagees discharging a pre-existing lien on the mortgaged premises are entitled to be subrogated thereto, if they acted in good faith: *Spaulding v. Harvey*, 129 Ind. 106; 28 Am. St. Rep. 176. A creditor who, in order to preserve his own security, is compelled to pay a prior lien held by another creditor will be subrogated to the rights of such creditor to the extent necessary for his own protection: *Reyburn v. Mitchell*, 106 Mo. 365; 27 Am. St. Rep. 350, and note. When one

person discharges an obligation which primarily rests upon another, he should be subrogated to the place of the injured party or the creditor in respect to the party who is primarily liable: *Regan v. New York etc. R. R. Co.*, 60 Conn. 124; 25 Am. St. Rep. 306, and note; *Johnson v. Barrett*, 117 Ind. 551; 10 Am. St. Rep. 83, and note.

SUBROGATION — MERE VOLUNTEER NOT ENTITLED TO. — To justify the application of the doctrine of subrogation, the person paying a debt for which another is primarily liable must have acted under the compulsion of saving himself from loss, and not as a mere volunteer: *Opp v. Ward*, 125 Ind. 241; 21 Am. St. Rep. 220, and note; *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783, and note; *Bunn v. Lindsey*, 95 Mo. 250; 6 Am. St. Rep. 48, and note.

LIENS — WHEN KEPT ALIVE. — A lien will be kept alive under some circumstances, in favor of one who has paid the lien-holder, although the latter has satisfied and discharged it of record; but where the equity is a latent one, the lien will not be kept alive, to the prejudice of a subsequent bona fide purchaser: *Richards v. Griffith*, 92 Cal. 493; 27 Am. St. Rep. 156.

REDEMPTION — COMPUTATION OF TIME FOR. — If the day of the month on which the right to redeem from a tax sale falls on Sunday, it should not be computed, and the owner should be allowed all of the following Monday in which to redeem: *Gage v. Davis*, 129 Ill. 236; 16 Am. St. Rep. 260. To the same effect, see *Hicks v. Nelson*, 45 Kan. 47; 23 Am. St. Rep. 709.

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[120 INDIANA, 305.]

POWER OF ATTORNEY TO ASSIGN JUDGMENT NEED NOT BE RECORDED. —

The statute requiring a power of attorney to be recorded does not apply to a power to assign judgments.

LIEN OF JUDGMENT PAID OFF KEPT ALIVE BY EQUITY WHEN. — When the purchaser of land pays off a judgment for which he is not liable, with the manifest intention to keep the lien thereof alive, equity will preserve it for his protection and use for equitable purposes.

MERGER — DOCTRINE OF, NOT APPLICABLE AGAINST PERSON PAYING DEBT FOR WHICH HE IS NOT LIABLE. — The technical doctrine of merger cannot be applied against a person not liable for a debt, who pays it off to protect property acquired from the person primarily liable.

MERGER NOT PREVENTED, WHERE FRAUD OR WRONG WOULD RESULT. — Merger is never prevented when fraud or wrong would result if it were defeated. If a legal rule secures justice, equity does nothing to defeat its operation, but gives it complete and effective force.

SHERIFF'S SALE — LAND RETAINED BY DEBTOR TO BE SOLD BEFORE THAT ALIENED. — Land subject to the lien of a judgment must be sold in the inverse order of its alienation, commencing with that remaining in the judgment debtor, and going next to that last sold by him, and one who has purchased land from the judgment debtor while it was subject to the lien of the judgment may, by a timely and appropriate application to a court of equity, compel the sheriff to first sell the land remaining in the hands of the debtor and the lands sold by him in the inverse order of their sale.

SATISFACTION OF JUDGMENT, ENTRY OF, EQUIVALENT TO PAYMENT WHEN.

— Where a judgment creditor buys at his own sale, his entry of satisfaction of the judgment is equivalent to payment in money.

SALE ON SATISFIED JUDGMENT VOID. — A sheriff's sale upon a satisfied judgment is void.

JUDGMENT CREDITOR BUYING AT HIS OWN SALE NOT BONA FIDE PURCHASER. — A judgment creditor who purchases at his own sale is chargeable with notice of all irregularities, for he is not a *bona fide* purchaser.

SHERIFF'S SALE MERELY IRREGULAR NOT COLLATERALLY ATTACKABLE. — A sheriff's sale which is merely irregular cannot be attacked collaterally.

LEVY, HOW FAR SATISFACTION OF JUDGMENT. — A levy is *prima facie* a satisfaction of the judgment to the extent of the value of the property levied upon.

JUDGMENT EXTINGUISHED BY SALE WHEN. — The sale of land under execution and the payment of the bid, when it is sufficient to satisfy the amount due, extinguish the judgment.

B. F. Ibach, B. M. Cobb, and C. W. Watkins, for the appellant.

J. B. Kenner and U. S. Lesh, for the appellees.

ELLIOTT, C. J. The appellant alleges in his complaint that on the fifteenth day of April, 1876, Milton Hendrix recovered a judgment against the appellee Lucas for \$917, in the Huntington circuit court; that Lucas was then the owner of three parcels of land situate in Huntington County, and described in the complaint; that one of the parcels was of the value of four hundred dollars; that Lucas sold it to Henry Kemp; that the other parcel was of the value of twelve hundred dollars; that Lucas sold to the appellee Morgan the second of the parcels of land for one thousand dollars; that the third parcel of land was of the value of fifteen hundred dollars, and was sold to John Edgar; that the judgment in favor of Hendrix was a lien upon all of the several parcels of land. The complaint further alleges that after Morgan purchased of Lucas the second parcel of land, Lucas became the owner of another parcel; that this last or fourth parcel was purchased from Lucas by the appellant; that the appellant paid the full value of the land, and received a warranty deed therefor; that at the time of his purchase of the fourth parcel of land from Lucas the appellant had no actual notice or knowledge of the existence of the Hendrix judgment; that Lucas was, at the time of the appellant's purchase, the owner of personal property of the value of two thousand dollars, and real property of the value of two thousand dollars; that all of this property was situated in Huntington County and subject to execution.

It is also alleged in the complaint that Lucas became the owner of another parcel of land before the sale to the appellant; that the land of which he became the owner was sold by Lucas since the appellant became the owner of the fourth parcel of land; that on the seventh day of October, 1880, John Morgan paid the Hendrix judgment; that "Morgan attempted to take an assignment of the judgment, which attempt was made in the order-book by one L. P. Milligan under and by virtue of a pretended power of attorney, which power of attorney was never recorded"; that on the third day of April, 1880, Hendrix caused an execution to be issued on his judgment; that the sheriff levied the execution, but returned it without a sale, and a *venditioni exponas* was issued; that a sale was made of the lands on this last writ, and the lands purchased by Morgan; that he entered satisfaction on the record of the judgment assigned to him. It is still further alleged in the complaint that the appellant had no notice of the judgment or the proceedings thereunder until after the sale; that he then examined the records, and found that the judgment had been entered satisfied; that the writ on which the sale was made was issued with the entry of satisfaction uncanceled, and without any disposition of the property levied upon under the former writs, or any order vacating the first sale; that the appellant had no notice of the last sale until long after it was made.

The position first assumed by counsel is, that the assignment of the judgment by Milligan, the attorney in fact of the original judgment creditor, was ineffective because the power of attorney was not recorded. There is no strength in this position. If, as the complaint tacitly concedes, Milligan was the attorney in fact of the judgment creditor, the assignment is not ineffective merely because the instrument investing the attorney with authority was not recorded. The statute requiring a power of attorney to be recorded does not apply to a power to assign judgments.

A more serious question than that disposed of arises on the contention that Morgan paid the judgment. The complaint avers that he did pay it, but it also shows that he took an assignment of it. We think it quite clear that if Morgan had extinguished the judgment by payment, he could not use it to the injury of the appellant, as the latter had a right in equity to have the other property of the judgment debtor first subjected to the payment of the judgment lien. As Morgan was

not primarily liable for the judgment, and as he did take an assignment of the judgment, the conclusion required by the authorities is, that he did not extinguish the judgment. It is settled beyond controversy that where the purchaser of land pays off a judgment for which he is not liable, and there is an intention manifested to keep the lien alive, equity will preserve it for his protection and use for equitable purposes: *Troost v. Davis*, 31 Ind. 34; *Hanlon v. Doherty*, 109 Ind. 37; *Strohm v. Good*, 113 Ind. 93; *Elston v. Castor*, 101 Ind. 426; 51 Am. Rep. 754; *Hewitt v. Powers*, 84 Ind. 295; *Lowrey v. Byers*, 80 Ind. 443; *Smith v. Ostermeyer*, 68 Ind. 432; *Howe v. Woodruff*, 12 Ind. 214; *Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625. We hold, upon this point, that the payment did not extinguish the lien of the judgment; but whether equity will suffer Morgan to use it to the injury of the appellant is quite another question. That question we will presently consider. All we do now is to adjudge that there was no complete or absolute extinguishment of the judgment. In holding this we necessarily affirm that the case is not within the rule, that where one pays off a judgment for which he was primarily liable, the judgment is extinguished.

The authorities to which we have referred conclusively answer the appellant's contention that as Morgan was the owner of the fee, the lien of the judgment was merged when he acquired it by assignment. It is a settled principle of equity jurisprudence that the technical doctrine of merger cannot be applied against a party not liable for a debt, who pays it off to protect property acquired from the person primarily liable. The intention and the situation of Morgan prevented a complete and absolute merger, and kept the lien of the judgment alive in his favor for equitable use: 2 Pomeroy's Eq. Jur., secs. 791, 792, 797.

The remaining question upon this branch of the case would be one of much difficulty if it were not settled by a former decision. Granting that there was no complete extinguishment of the judgment either by payment or by merger, there yet remains the question, Can Morgan so use the judgment lien as to subject the land of the appellant to sale to satisfy it? As the initial step in the discussion, we state, as a fundamental principle, that merger is never prevented when fraud or wrong would result if it were defeated: *Worthington v. Morgan*, 16 Sim. 547; *Hutchins v. Carleton*, 19 N. H. 487; *McGiven v. Wheelock*, 7 Barb. 22. This is a just principle, and adherence

to it is required by considerations of consistency as well as considerations of justice. A legal rule stands, unless confronted by a superior equity. If a legal rule will secure justice, equity will do nothing to defeat its operation, but, on the contrary, will do all in its power to give it complete and effective force. If, therefore, it is not equitable to defeat merger against the appellant, as to him equity will give the legal doctrine full sway, although as to others it may interpose to break down the rule of the law. Whether the appellant is in such a situation as to ask equity to allow the legal rule to take its course, we will hereafter determine and declare. Another matter demands consideration before examining the question of the influence exerted by the position which the appellant occupies, and that is this: Morgan must rely entirely upon equity to prevent a merger as against the appellant, and if what he asks is unconscionable, equity will not lend him a helping hand. Equity keeps the judgment alive only that it may be used by him for an equitable purpose. He cannot, therefore, succeed upon equitable principles, unless his case is one in which good conscience requires that a legal rule be broken for his benefit, and the judgment kept alive in furtherance of justice. The legal rule is against him, and only equity can relieve him. His appeal is to a court of conscience, and it will be fruitless if his case is tainted by fraud or wrong: *Kitts v. Wilson*, 130 Ind. 492. While it may be true that there is no complete merger under the legal rule, it does not follow that the judgment will be kept alive for an inequitable purpose.

We come now to the question, What is the equity of the situation? If it is with Morgan, the appellant must fail; if against him, the legal rule must, if we adhere to principle and do not yield to the former decision, prevail, and the appellant succeed. Appellees' counsel say: "A sale of one tract of land is not invalid, notwithstanding one who was a later purchaser might have an order in equity for a sale in the inverse order had he properly applied for the same." They cite *Sansberry v. Lord*, 82 Ind. 521. It seems clear that the assertion of counsel, if it correctly states the rule, proves that their client is in no situation to invoke the aid of equity to overthrow a rule of law for his benefit, against one possessing such equities as the appellant possesses. In the case to which counsel refer it was said: "It is presumed to be the duty of the judgment debtor, as between himself and his ven-

dee, to pay the judgment, and if he retains any of the property encumbered by it, a court of equity will, without impairing the lien, require the judgment creditor to first exhaust the property held by the debtor so as to protect his vendee." This doctrine is strongly against the appellee Morgan, for he is here asking the aid of equity to break a legal rule, while he is himself seeking to do what equity condemns, inasmuch as he is asking equity to assist him, while he is at the same time seeking to break down the equitable doctrine that property shall be sold in the inverse order, commencing with that remaining in the judgment debtor, and going next to the property last sold by the debtor.

The rule that a purchaser of land may, by a timely and appropriate application to a court of equity, have lands remaining in the debtor first sold, and lands sold in the inverse order of their sale by the debtor, is a familiar and well-established one: *Richey v. Merritt*, 108 Ind. 347; *Ritter v. Cost*, 99 Ind. 80; *Caley v. Morgan*, 114 Ind. 350; 12 Am. & Eng. Ency. of Law, 216, note 1. But the case of *Caley v. Morgan*, 114 Ind. 350, while fully recognizing the principle stated by us, adjudged that it is not applicable to such a case as this, for the reason that the owner of the land did not ask the assistance of a court of equity before the sale. The decision in that case, although not directly conclusive, because the parties here are not the same as in that case, must, as we suppose, be regarded as decisive of the question here under immediate mention, inasmuch as the judgment there involved, and the questions there under discussion, were, with one exception, the same as those here under consideration. We yield to the decision in the case referred to with reluctance, because we are strongly impressed with the belief that it was not well decided, inasmuch as we believe that while there was not a complete merger, Morgan cannot escape the legal rule for the purpose of using the judgment in violation of an equitable principle.

There is in the present case one important and material fact not in the case of *Caley v. Morgan*, 114 Ind. 350. That fact is this: Morgan caused the land to be exposed to sale without having the first sale set aside, or the entry of satisfaction made by him vacated. That fact was not considered in the case referred to, so that there is no judgment upon it. As the record exhibited the facts, the judgment was satisfied, the first sale effective, and Morgan's rights under that sale

complete. It is no doubt true that the appellant was charged with such notice as the record imparted, and that his averment that he had no actual notice of the judgment lien is unavailing: *Taylor v. Morgan*, 86 Ind. 295. But he had a right to rely upon the whole record, and part of the record informed him that the judgment was satisfied, and that part of the record was made by Morgan himself. If the appellant is bound by the record, so, also, is Morgan. In our judgment, Morgan had no right to disregard the first sale at his own pleasure, and make a second one after having the judgment entered satisfied. If a stranger had bought the property, we think it quite clear that Morgan could not, by his own act, have treated the sale as a nullity. The sale was complete, the receipt of Morgan to the sheriff for the price of the property was as effective as payment in actual money would have been, for it is settled that where a judgment creditor buys at his own sale his entry of satisfaction of the judgment is equivalent to payment in money, inasmuch as there is no reason for going through the empty form and idle ceremony of handing the money over to the sheriff and then receiving it back from him. It is also well settled that a sale upon a satisfied judgment is void: *Chapin v. McLaren*, 105 Ind. 563; *Myers v. Cochran*, 29 Ind. 256; *State v. Salyers*, 19 Ind. 432; *Laval v. Rowley*, 17 Ind. 36.

Morgan was the purchaser at his own sale, and even in ordinary cases would be held chargeable with notice of all irregularities, for he does not occupy the position of a *bona fide* purchaser: *Raub v. Heath*, 8 Blackf. 575; *Harrison v. Doe*, 2 Blackf. 1; *Keen v. Preston*, 24 Ind. 395; *Hamilton v. Burch*, 28 Ind. 233; *Piel v. Brayer*, 30 Ind. 332; 95 Am. Dec. 699; *Bole v. Newberger*, 81 Ind. 274; *Carnahan v. Yerkes*, 87 Ind. 62; *Shirk v. Thomas*, 121 Ind. 147; 16 Am. St. Rep. 381, and authorities cited; *Warren v. Hull*, 123 Ind. 126; *Johnson v. Hess*, 126 Ind. 298 (311). If a third person had bought the land at the first sale, and had paid his bid, the receipt of the amount paid by such purchaser by the execution creditor would unquestionably have extinguished the judgment: *Klippel v. Shields*, 90 Ind. 81; *Shields v. Moore*, 84 Ind. 440; *Moon v. Jennings*, 119 Ind. 130; 12 Am. St. Rep. 383; *Kreider v. Isenbice*, 123 Ind. 10.

The appellee directs our attention to several authorities, which we have examined, but we find nothing in them which opposes the conclusion we have stated. The case of *Harrison*

v. *Doe*, 2 Blackf. 1, is adverse to the appellees, for in that case it was held that the sale was void as to the execution creditor purchasing at his own sale, but it is tacitly asserted that the rule would have been different had the land been bid off by a *bona fide* purchaser at the sheriff's sale. The decision in *Morss v. Doe*, 2 Ind. 65, is, that a sale where there is no appraisal is void; and the decision in *Fletcher v. Holmes*, 25 Ind. 458, is to the same effect. In *Davis v. Campbell*, 12 Ind. 192, it was held that a sheriff's sale could not be successfully attacked in a collateral proceeding upon the ground that the sheriff refused to levy on personal property of the debtor. It is evident that none of these cases, nor any of a similar type, is in point here; for here there is of record a satisfaction of the judgment.

We agree fully with the statement of appellee's counsel that there are cases where a levy may be abandoned, but we cannot agree that the rule that a levy may be abandoned controls such a case as this, where the record affirmatively shows that the first sale operated, *prima facie* at least, to satisfy the judgment. There is here much more than an abandonment of a levy and much more than the abandonment of a void sale, for the sale was, so far as the record shows, so effective as to induce the judgment creditor to satisfy the judgment of record. Presumptively, at least, the sale was not void or even voidable. If it was not void, the appellees had no right, at their sole pleasure and mere will, to treat it as of no effect. They cannot occupy inconsistent positions at their own volition. The argument, and it is a sound one, that a merely irregular sale cannot be collaterally attacked, strikes strongly at the very foundation of the appellee's position. If an irregular sale cannot be collaterally assailed, certainly the judgment creditor cannot, at his mere will or pleasure, repudiate it and again expose the property to sale. He must first get rid of his own sale and his own entry of satisfaction. The appellee Morgan had a right to have the sale vacated if it was illegal or irregular: *Clayton v. Glover*, 3 Jones Eq. 371; *Galbreath v. Drought*, 29 Kan. 711. But having made the sale, purchased the property, entered the judgment satisfied of record, he has no right to ask that it shall be presumed, as against a *bona fide* purchaser from the judgment debtor, that the sale was illegal. It is settled that *prima facie* a levy is a satisfaction of the judgment to the extent of the value of the property levied upon: *McCabe v. Goodwine*, 65 Ind. 288, and

authorities cited; *McIver v. Ballard*, 96 Ind. 76; *Harmon v. State*, 82 Ind. 197. There is much more reason for applying the presumption of satisfaction to such a case as this, than to a case where there is nothing more than a levy, for here there was a sale, and as the record made by Morgan himself affirmatively shows, a satisfaction of the judgment.

We adjudge, without going further in this case, for there is no necessity for doing so, that the complaint shows a *prima facie* satisfaction of the judgment upon which the land was sold, and that the complaint is at least sufficient to drive the appellees to answer.

Judgment reversed.

MERGER — WHEN THE DOCTRINE DOES NOT APPLY. — A debtor executed a mortgage as security for a liability incurred by his surety. Afterwards, the surety paid the debt, and the debtor deeded the land to him, subject to the mortgage, with the proviso that it was to remain open. There was no merger: *Agnew v. Charlotte etc. R. R. Co.*, 24 S. C. 18; 58 Am. Rep. 237. Merger does not occur where a mortgagee purchases the equity of redemption, if it is to his advantage to keep the mortgage alive, and it can be done without prejudicing the rights of the mortgagor or third persons: *Vannice v. Bergen*, 16 Iowa, 555; 85 Am. Dec. 531, and note. The purchase of a senior mortgage by the purchaser of the equity of redemption to protect his title does not create a merger so as to extinguish the lien of the mortgage in favor of the intermediate mortgagee: *Millsbaugh v. McBride*, 7 Paige, 509; 34 Am. Dec. 360, and note. See also *Hunt v. Hunt*, 14 Pick. 374; 25 Am. Dec. 400, and note.

ORDER OF SALE OF LANDS TO SATISFY JUDGMENT. — The land last sold by a judgment debtor is first subject to be applied to the satisfaction of a judgment lien upon it and lands previously sold: *Rodgers v. McCluer*, 4 Gratt. 81; 47 Am. Dec. 715, and note, in which cases are cited holding that where lands subject to a judgment are sold, they are liable in the inverse order of their alienation.

SHERIFF'S SALE — IRREGULARITY — COLLATERAL ATTACK. — The failure of a sheriff to post a notice of the sale of land under execution in front of the court-house, as required by law, is an irregularity which cannot affect the title of an innocent purchaser in a collateral proceeding: *Evans v. Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701, and note. See also *Johnson v. Murray*, 112 Ind. 154; 2 Am. St. Rep. 174, and note on irregular execution sales.

JUDGMENT — ENTRY OF SATISFACTION, WHETHER EXTINGUISHES JUDGMENT. — The entry of satisfaction of a judgment does not extinguish the judgment except in favor of intervening liens: *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783. An execution indorsed "satisfied" in the sheriff's office may be shown not to have been fully paid, and will retain its lien for the unpaid balance as against other creditors: *Sims v. Campbell*, 1 McCord Eq. 53; 16 Am. Dec. 595.

EXECUTION — DISCHARGE OF. — A payment to the sheriff discharges an execution: *Den v. Roberts*, 11 Ired. 424; 53 Am. Dec. 419, and note. The payment to a sheriff on the foot of a *fiery facias* discharges the judgment as to the debtor: *Boas v. Updegrave*, 5 Pa. St. 516; 47 Am. Dec. 425.

JUDGMENT — LEVY OF EXECUTION, HOW FAR SATISFACTION OF. — A levy on personal property sufficient to satisfy an execution is *prima facie* a satisfaction of it: *Doe v. Hamilton*, 23 Miss. 496; 57 Am. Dec. 149, and note; *Ex parte Lawrence*, 4 Cow. 417; 15 Am. Dec. 386, and note. An execution is satisfied to the extent of the value of the property levied upon, where such property has been lost to the defendant by the misconduct or neglect of the sheriff: *Walker v. Commonwealth*, 18 Gratt. 13; 98 Am. Dec. 631, and note. A valid and subsisting levy upon sufficient personal property is at least a satisfaction *sub modo* of the judgment: *First Nat. Bank v. Rogers*, 13 Minn. 407; 97 Am. Dec. 239. See also *Trapnall v. Richardson*, 13 Ark. 543; 58 Am. Dec. 338, and extended note 350-363, in which this subject is thoroughly discussed.

A SUBSEQUENT SALE UNDER A SATISFIED EXECUTION IS VOID, and the purchaser at such sale obtains no title: *Den v. Roberts*, 11 Ired. 424; 53 Am. Dec. 419, and note. See also *Doe v. Ingersoll*, 11 Smedes & M. 249; 49 Am. Dec. 57, and note with cases collected.

JUDGMENT CREDITOR PURCHASING AT HIS OWN SALE — WHETHER BONA FIDE PURCHASER. — A judgment creditor purchasing at the execution sale is chargeable with notice of all irregularities in the proceedings: *Smith v. Huntoon*, 134 Ill. 24; 23 Am. St. Rep. 646. Where the owner of a judgment under which land is sold at execution sale becomes the purchaser at such sale, he takes the land charged with all the equities to which it is subject: *Barnett v. Vincent*, 69 Tex. 685; 5 Am. St. Rep. 98, and note. The purchaser at a sheriff's sale, who is also the plaintiff in execution to whom the money is payable, and who therefore parts with no money, is not a purchaser for a valuable consideration: *Williams v. Hollingsworth*, 1 Strob. Eq. 103; 47 Am. Dec. 527. A judgment creditor purchasing at his own sale, without notice, is a *bona fide* purchaser within the California registration act: *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543.

ERWIN LANE PAPER COMPANY v. FARMERS' NATIONAL BANK OF CONSTANTINE.

[130 INDIANA, 367.]

PROMISSORY NOTE PAYABLE TO CASHIER OF BANK MAY BE SUED ON BY BANK. — A promissory note made payable to the cashier of a bank is to be deemed payable to the bank, and the bank may sue thereon as payee.

H. C. Dodge and J. S. Dodge, for the appellants.

Howell, Carr, and Barnard, for the appellee.

MILLER, J. The only question discussed in the briefs of counsel is the sufficiency of the complaint, which has been challenged for the first time in this court.

This was an action by the appellee against the appellants upon a promissory note made payable to "Charles H. Barry, Jr., cashier of the Farmers' National Bank of Constantine."

The complaint declares upon the note as being made payable to the bank.

The only objection urged to the sufficiency of the complaint is, that the note is payable to Barry, and not to the bank.

A note payable to the cashier of a bank is to be deemed payable to the bank, and the bank may sue thereon as payee: *Nave v. Hadley*, 74 Ind. 155, and cases cited.

Judgment affirmed.

BANKS. — In the absence of any showing limiting the power of a bank cashier, as such, he may collect a note due the bank, and to that end may bring suit on it: *Young v. Hudson*, 99 Mo. 102. The cashier of a bank is the officer whose duty it is to receive, directly or through subordinate officers, the funds of the bank, and conduct its moneyed operations: *Merchants' Bank v. Rauls*, 7 Ga. 191; 50 Am. Dec. 394. See extended note to *Corser v. Paul*, 77 Am. Dec. 759, on the implied powers of bank cashiers. A cashier may recover upon money counts the amount of a bill of exchange drawn payable to him and accepted for value, although he holds the bill in trust for the bank: *Johnson v. Catlin*, 27 Vt. 87; 62 Am. Dec. 622, and note. A note made payable to a town treasurer by name may be sued on by the town: *Allington v. Hinds*, 1 D. Chip. 431; 12 Am. Dec. 704, and extended note, discussing suits by principals on notes to agents. The case of *Rose v. Lafan*, 2 Speers, 424, 42 Am. Dec. 376, is opposed to the principal case. In that case it was held that "cashier," subjoined to the name of a party in whose favor a bill of exchange has been accepted, is a mere *descriptio personæ*, and the legal title vests in the party personally. It implies no benefit to the bank of which the party may be cashier.

REINKEN v. FUEHRING.

[130 INDIANA, 382.]

TAXES AND ASSESSMENTS, DISTINCTION BETWEEN. — There is a clear distinction between taxes and assessments. Taxes are impositions for purposes of general revenue; assessments are special and local impositions upon property in the immediate vicinity of an improvement for the public welfare, which are necessary to pay for the improvement, and laid with reference to the special benefits which such property derives from the expenditure.

ASSESSMENT ON ABUTTING PROPERTY FOR SWEEPING STREET IS NOT TAX. — An assessment made against the owners of property abutting on streets required to be swept and sprinkled, for the purpose of paying the expense of such sweeping and sprinkling, is not a tax, but a local assessment, and a statute authorizing such an assessment does not violate a constitutional provision requiring an equal and uniform rate of taxation.

POLICE POWER, LOCAL ASSESSMENTS FOR SWEEPING STREETS PROPER EXERCISE OF. — Since the public in general has an interest in keeping the streets free from filth, a city may, in exercising the police power conferred upon it by the state, order them swept; and as the abutting prop-

erty owner derives a benefit from such sweeping not enjoyed by the general public, he may be required by assessment to pay the expense of such sweeping; and such an assessment does not amount to a taking of private property without compensation and without due process of law.

PROPERTY OWNER ASSESSED MAY ALSO BE TAXED GENERALLY. — Since a property owner assessed for the expense of sweeping the street in front of his lot is fully compensated for his outlay in the enhanced value of his property, he may be taxed generally, also, with the balance of the public for cleaning other streets in which the public alone have an interest, and which cannot be swept as the streets upon which his property abuts.

STREET CROSSINGS, STATUTE AUTHORIZING ASSESSMENT FOR SWEEPING OF, NOT INVALID. — The fact that a statute authorizing the assessment of property for the sweeping of streets contemplates the sweeping of the crossings does not render it invalid, since it cannot be said that the property owners do not receive a special benefit from keeping them clean.

C. S. Denny and W. F. Elliott, for the appellant.

A. L. Mason, for the appellees.

COFFEY, J. The appellees brought this suit in the Marion County circuit court to foreclose a lien for the amount assessed against the appellant's real estate for sweeping the street in front of his property in the city of Indianapolis, under a contract made between the city and the appellees pursuant to the provisions of the city charter. A demurrer to the complaint was overruled, and the appellees had judgment, from which this appeal is prosecuted.

The charter of the city of Indianapolis is found in the acts of the general assembly of 1891, page 137. It provides for the mode of improving the streets and the payment for such improvements, and confers on the city, through its proper officers, the power to make contracts for sprinkling and sweeping such streets in the city as it may deem proper, and to assess against the property-holders abutting on such streets the cost of such sprinkling and sweeping. The only question before us for decision relates to the constitutionality of so much of the act as authorizes the city to contract for sprinkling and sweeping the streets at the cost of the property-holders along the line of such streets, it being contended by the appellant that these provisions are unconstitutional for the reasons, — 1. That it violates the provisions of our state constitution requiring an equal and uniform rate of taxation. 2. Because, even if the city has power to compel abutting property owners to pay for sweeping the streets in front of their property, it has no power to compel them to do so, and at the same time compel them to pay into the general fund a part of the cost

of cleaning other streets, as provided for in the act. 3. Because the proceeding which the act attempts to authorize amounts to a taking of private property without due compensation and due process of law.

To support his contention as to the first proposition presented, the appellant relies, to some extent, upon the case of *Gridley v. City of Bloomington*, 88 Ill. 554; 30 Am. Rep. 566; and the case of *City of Chicago v. O'Brien*, 111 Ill. 532; 53 Am. Rep. 640. These cases hold that an ordinance making it the duty of the owner or person occupying premises abutting upon a street to keep the sidewalks free from snow and ice, and providing for the enforcement of such ordinance by the infliction of penalties, is void. The cases seem to rest, principally, upon the peculiarity of the laws of the state of Illinois, under which the lot-owner does not own the fee in the street. The last case, however, was decided by a divided court, three of the judges refusing to concur in the conclusion reached.

The authorities make a clear distinction between the word "taxation" and the word "assessment." "'Taxes' are impositions for purposes of general revenue; 'assessments' are 'special and local impositions upon property in the immediate vicinity' of an improvement for the public welfare, 'which are necessary to pay for the improvement, and laid with reference to the special benefits which such property derives from the expenditure'": *Palmer v. Stumph*, 29 Ind. 329.

This distinction is recognized in nearly all the states of the Union. For a collection of the authorities upon this subject, see the case above cited.

The assessment, therefore, made against the owners of property along the streets required to be swept, under the act in question, to pay the expense of such sweeping, is not a tax, but a local assessment.

The question is then presented as to whether a local assessment for this purpose can be sustained under our constitution.

If it can be sustained at all, it must be upon the ground that it is the proper exercise of the police power of the state, and a special benefit to the abutting property owner.

The power of a municipal corporation to order sidewalks of a particular kind, and to assess against the abutting property owner an amount necessary to pay for the same, and to pay

for keeping the same in repair and proper condition for the use of the public, is generally upheld upon the ground that it is proper exercise of the police power of the state: *Goddard, Petitioner, etc.*, 16 Pick. 504; 28 Am. Dec. 259; *Palmer v. Way*, 6 Col. 106; Cooley on Taxation, 396, 397; *State etc. v. Mayor etc.*, 37 N. J. L. 415; 18 Am. Rep. 729; *Kirby v. Boylston*, 14 Gray, 249; 74 Am. Dec. 682; *Pedrick v. Bailey*, 12 Gray, 161; *Moore v. Gadsden*, 93 N. Y. 12; *Hartford v. Talcott*, 48 Conn. 525; 40 Am. Rep. 189.

Judge Cooley says: "The cases of assessments for the construction of walks by the side of the streets, in cities and other populous places, are more distinctly referable to the power of police. These foot-walks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities to order the walks of a kind and quality by them prescribed to be constructed by the owners of adjacent lots at their own expense, within a time limited by the order for the purpose, and in case of their failure so to construct them, to provide it shall be done by the public authorities, and the cost collected from such owners, or made a lien upon their property. When this is the law, the duty must be looked upon as being enjoined as a regulation of police, because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper state, and of afterwards keeping them in a condition suitable for use": Cooley on Taxation, 396, 397.

Assuming, as held by these authorities, that the power to make local assessments to pay for local improvements or benefits is to be referred to the police power of the state, we are naturally led to inquire whether the assessments provided for in the charter now under consideration amount to a taking of private property without compensation and without due process of law, as contended by the appellant.

Mr. Sedgwick, in his valuable work on statutory and constitutional law, 434, says: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has

always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given."

Judge Dillon, in his work on municipal corporations (vol. 1, p. 212), says: "Every citizen holds his property subject to the proper exercise of this [police] power, either by the state legislature directly, or by public or municipal corporations to which the legislature may delegate it. . . . It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. . . . If he suffers injury, it is either *damnum absque injuria*, or in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

In the case of *Goddard, Petitioner, etc.*, 16 Pick. 504, 28 Am. Dec. 259, in speaking of an ordinance which required the abutting property owners to keep the sidewalks free from snow and ice, the supreme court of Massachusetts said: "But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class. . . . Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it and benefit from it distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit, often in accommodating his cellar door and steps, a passage for fuel, and the passage to and from his own house to the street. . . . For his own accommodation he would have an interest in cleaning the snow from his own door. The owners and occupiers of house-lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community."

The case of *Village of Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, involved the validity of an ordinance which required the owners of abutting property to keep the sidewalks adjacent to their property free from snow and ice

at their own expense, and after a careful review of some of the authorities above cited, the court of appeals reached the conclusion that the ordinance was valid as a reasonable exercise of the police power of the state.

The principles which rule the cases above cited cannot, in our opinion, be distinguished from the principles which rule the case at bar. Of course, it is not claimed that in the exercise of the police power such assessments could be made and collected from the abutting property owner unless he had a special interest and derived a special benefit therefrom not enjoyed by the public in general, but if he has a special interest in the improvement of the street and sidewalk, and in keeping them free from snow and ice, so he has a special interest in keeping them free from accumulating filth. It is matter of common observation, of which we must take notice, that property located upon well-improved streets kept clean is more desirable than property on unimproved streets, where mud and filth are permitted to accumulate and obstruct their use. It is safe to assert, we think, that keeping a street clean adds to the rental if not to the permanent value of property located thereon; and for this reason, among others, the abutting property owner has a special interest in such cleaning not enjoyed by the general community. For the reason that the public in general has an interest in keeping the streets free from filth, the city may, in exercising the police power conferred upon it by the state, order them swept; and for the further reason that the abutting property owner derives a benefit from such sweeping not enjoyed by the general public, he may be required, by assessments, to pay the expenses incident to such sweeping.

It follows from what we have said that the assessments provided for by the act under consideration do not amount to a taking of private property without compensation and without due process of law.

Assessments of the kind we are now considering are made upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they can be sustained.

If the property owner is fully compensated for his outlay in the enhanced value of his property, we see no reason why he may not be taxed generally, also, with the balance of the pub-

lic for cleaning other streets in which the public alone have an interest, and which are not, and indeed cannot be, swept as the streets upon which his property abuts. We are not able to perceive how such a tax would be unjust or inequitable, inasmuch as he receives as much benefit therefrom, in contemplation of law, as any other member of the community. As he has been fully compensated for his outlay in sweeping the street upon which his property is situated, he should not be heard to complain of such payment when called upon to bear his portion of other public burdens.

Nor do we think the fact that the statute contemplates the sweeping of the crossings renders it invalid. It cannot be said that the property owners do not receive a special benefit from keeping them clean. Sweeping the street in front of the property would be of little benefit if filth and rubbish were permitted to accumulate upon the crossings, so as to render them unfit for use. If the property does in fact receive a special benefit from sweeping the crossings, there is no reason why those who are thus benefited should not pay the expense.

Having carefully examined all the objections urged against the validity of so much of the statute as is here called in question, we have reached the conclusion that it is not unconstitutional, and that the court did not therefore err in overruling a demurrer to the complaint before us.

Judgment affirmed.

TAXES AND ASSESSMENTS — DISTINCTION BETWEEN. — Taxation and assessment are regarded as distinct modes of raising money for different purposes, and founded upon different principles. Taxation is a general burden imposed for supporting the government, and the revenue raised is expended for the equal benefit of the public at large. Assessment rests upon the taxing power, but is a distinct and well-known mode of laying a local burden upon particular property with reference to a special benefit to be derived by such property: *Hill v. Higdon*, 5 Ohio St. 243; 67 Am. Dec. 289, and note; note to *People v. Mayor*, 55 Am. Dec. 289; see *Bridgeport v. New York etc. R. R. Co.*, 36 Conn. 255; 4 Am. Rep. 63. As to what is a tax, see extended note to *New Orleans v. Great Southern Tel. Co.*, 8 Am. St. Rep. 506; also note to *McCord v. Pike*, 2 Am. St. Rep. 94, in which the purposes of taxation are discussed. As to what are assessments, and the purposes for which levied, see note to *Zigler v. Menges*, 16 Am. St. Rep. 371. An ordinance requiring every person on a certain street to lay a pavement in front of his lot, or in default, requiring the constable to do so and bring an action against the owner for costs, is not a tax: *Mayor v. Maherry*, 6 Humph. 368; 44 Am. Dec. 315. To the same effect, see *Goddard, Petitioner*, 16 Pick. 504; 28 Am. Dec. 259, and note. A constitutional provision requiring taxation to be equal and uniform and *ad valorem* relates to taxation for revenue, and not to assessments by municipalities for local improvements: *Davis v. Lynchburg*, 84 Va. 861;

Spokane Falls v. Browne, 3 Wash. 84. See also *State v. Brown*, 53 N. J. L. 162.

TAXES — POWER TO LEVY INCLUDES POWER TO ASSESS FOR LOCAL IMPROVEMENT: See *Elmore v. Drainage Comm'rs*, 133 Ill. 269; 25 Am. St. Rep. 363. An act authorizing the assessment of the cost of grading and paving streets against the abutting property is not in conflict with, nor though a special act is it repealed by, an article of the constitution providing for uniformity of taxation: *Beaumont v. Wilkesbarre*, 142 Pa. St. 198.

MUNICIPAL CORPORATIONS — POLICE POWER. — A municipal ordinance requiring the owners or occupants of property to remove ice, snow, and other obstructions falling or collecting thereon, and imposing a penalty for failing to do so, is a valid exercise of the police power: *Village of Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490; see *Macon v. Patty*, 57 Miss. 378; 34 Am. Rep. 451, and note; also *McCormack v. Patchin*, 53 Mo. 33; 14 Am. Rep. 440, and note.

PARVIN v. WIMBERG.

[180 INDIANA, 561.]

CONSTRUCTION OF STATUTE ACCEPTED BY ELECTION OFFICERS NOT IGNORED BY COURTS, UNLESS PALPABLY WRONG. — A construction of an election law that has been accepted and acted upon by the officers whose duty it is to administer the law will not be ignored by the courts, unless it is palpably wrong.

ELECTIONS, POWER OF LEGISLATURE TO PRESCRIBE MANNER OF HOLDING. — It is within the power of the legislature to prescribe the manner of holding elections and the mode in which electors shall express their choice.

ELECTOR MUST VOTE IN MANNER PRESCRIBED BY LAW. — Where the law requires an elector, in voting, to express his choice by stamping certain designated squares on the ballot, if he does not choose to indicate his choice in the manner prescribed, he cannot complain if his ballot is not counted.

AUSTRALIAN BALLOT, MODE IN WHICH IT MUST BE STAMPED. — An elector voting under the Australian system must indicate his choice by stamping one of the squares of his ballot; he cannot stamp his ballot elsewhere, and leave the election board to guess at his intention.

MERE IRREGULARITIES OF ELECTION OFFICERS DO NOT VITIATE ELECTION. — Mere irregularities on the part of election officers, or their omission to observe some merely directory provision of the law, do not vitiate the election.

STATUTE, WHETHER MANDATORY OR DIRECTORY, HOW DETERMINED. — If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts must hold the statute to be mandatory, whether the particular act in question goes to the merits or affects the result of the election or not. But if a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, it will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits.

CONSTRUCTION OF STATUTE, MATTERS CONSIDERED BY COURT IN. — For the purpose of construing a statute and ascertaining the intention of the legislature, the courts will look to the whole statute and all its parts, and when such intention is ascertained, it will prevail over the literal import and strict letter of the statute; and where the meaning is doubtful and uncertain, the courts will look into the situation and circumstances under which it was enacted, to other statutes, if there are any upon the same subject, whether passed before or after the statute under consideration, and whether in force or not, as well as to the history of the country, and will carefully consider, in this connection, the purpose sought to be accomplished.

BALLOT NOT TO BE REJECTED BECAUSE INDORSED BY CLERK IN WRONG PLACE. — The statute requiring the clerks of election to indorse their initials upon the ballots is mandatory, but the requirement that the initials shall be indorsed in a particular place on the back of the ballot is directory merely. A ballot indorsed at an improper place cannot therefore, for that reason only, be rejected.

BALLOTS PLACED BY MISTAKE OF ELECTION OFFICER IN WRONG BOX MUST BE COUNTED. — A ballot cannot be rejected in making the count because the election officers, by mistake, have placed it in the wrong box.

A. Gilchrist, C. A. De Bruler, and D. B. Kumler, for the appellant.

J. M. Butler, A. H. Snow, J. M. Butler, Jr., J. E. Williamson, P. W. Frey, and J. I. Walker, for the appellees.

COFFEY, J. At the November election for the year 1890 the appellant and Henry Stockfleth were opposing candidates for the office of county auditor of Vanderburgh County, in this state.

The board of canvassers having declared the appellant duly elected, this proceeding was commenced by the appellee Henry Wimberg before the board of commissioners of that county, to contest the election upon the alleged ground that Stockfleth had received more votes for the office than had been cast for the appellant.

The cause was appealed to the Vanderburgh circuit court, from which a change of venue was granted to the Gibson circuit court.

In the latter court, issues were formed, upon which the cause was tried by the court, resulting in a judgment against the appellant.

At the request of the appellant, the court made a special finding of the facts in the case, from which it appears, among other things, that returns of the election were made by the judges of election and canvassed by the board of canvassers, and that it was determined by the canvass that the appel-

lant had received 4,745 votes, and that Henry Stockfleth had received 4,735 votes, and thereupon the board declared the appellant duly elected.

It further appears that the appellant received twenty-seven votes at the election which were not counted for him, and that Stockfleth received sixty-one votes which were also rejected by the judges of election, and that the number so received by these parties, and not counted, were not included in the votes canvassed by the board of canvassers, and that the total number of votes cast at the election for the appellant was 4,772, and for Stockfleth, 4,796.

The only question discussed by counsel on this appeal are questions arising on the ruling of the court below in overruling the appellant's motion for a new trial.

It is insisted by the appellant that the finding of facts above set out is not sustained by the evidence. It is also urged that the circuit court erred in admitting in evidence certain ballots offered by the appellee to sustain the issue tendered by him. It appears by the record before us that the appellee offered in evidence, on the trial of the cause, certain ballots, none of the squares upon which had been touched by the stamp, which ballots were admitted and read in evidence over the objection of the appellant.

As it is perfectly apparent that the court could not have made the finding set out above without counting some of these ballots, the question, therefore, as to whether they were admissible in evidence, and the question as to whether the finding is sustained by the evidence, may very properly be considered together.

The solution of these questions depends upon the construction of the act of the general assembly, approved March 6, 1889, known as the "Election Law."

Section 26 of this act prescribes the following form of ballot to be used at all subsequent general elections, viz.: —

<div style="border: 1px solid black; padding: 5px; display: inline-block;">Dem.</div>	Device. Democratic Ticket.	<div style="border: 1px solid black; padding: 5px; display: inline-block;">Rep.</div>	Device. Republican Ticket.	<div style="border: 1px solid black; padding: 5px; display: inline-block;">Prohi.</div>	Device. Prohibition Ticket.
<div style="border: 1px solid black; padding: 5px; display: inline-block;">Dem.</div>	For Governor, Courtland C. Matson.	<div style="border: 1px solid black; padding: 5px; display: inline-block;">Rep.</div>	For Governor, Alvin P. Hovey.	<div style="border: 1px solid black; padding: 5px; display: inline-block;">Prohi.</div>	For Governor, Joseph D. Hughes.

Section 45 of the act provides that "when a voter shall have been passed by the challengers, or shall have been sworn

in, he shall be admitted to the election-room. . . . On entering the room, the voter shall announce his name to the poll-clerks, who shall register it. The clerk holding the ballots shall deliver to him one state and one local ballot, and the other clerk shall thereupon deliver to him a stamp, and both poll-clerks, on request, shall give explanation of the manner of voting. . . . The voter shall then, and without leaving the room, go alone into any of the booths which may be unoccupied, and indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names; . . . provided, however, that if he shall desire to vote for all candidates of one party, . . . and none other, he may place the stamp on the square preceding the title under which the candidates of such party . . . are printed, and the vote shall then be counted for all the candidates under that title, unless the name of one or more candidates under another title shall also be stamped, in which case the names of the candidates so stamped shall be counted."

It is contended by the appellant that the provision of this statute requiring the voter to indicate his choice by stamping the square is mandatory, while it is contended by the appellee that such provision is directory only, and that the voter may indicate his choice without touching the square with the stamp.

It is conceded that this law is an entire departure from the modes of voting known and used in this state prior to its passage. Such being the case, before any election was held under this law, the two leading political parties in the state, through the chairman of their respective state central committees, selected six practicing attorneys of the state, conspicuous for their legal learning, to whom the law was referred, with a request that they would construe and interpret it, and prepare instructions for the information and guidance of the electors and election officers of the state.

In the report of these eminent lawyers are found the following instructions, viz.:—

"1. You must get your ballots of the polling-clerks in the election-room.

"2. If you want to vote a straight ticket, stamp the square on the left of the name of the party for whose candidates you wish to vote. If you do not wish to vote a straight ticket, then do not stamp the square to the left of the name of your party, but stamp the square to the left of the name of each

candidate for whom you desire to vote, on whatever list of candidates it may be.

“3. Do not mutilate your ballot, or mark it, either by scratching a name off or writing one on, or in any other way, except by stamping on the square or squares as above mentioned; otherwise the ballot will not be counted. . . . If a ballot is not stamped on one of the squares at the left of the titles of the tickets, it will be counted for the names with stamps on their squares to the left of them, and no others.”

It is fair to presume that the electors and election officers throughout the state accepted this as the true construction of the statute under consideration, and thereupon, in conducting the ensuing election, acted upon it. This construction having been accepted and acted upon by the officers whose duty it was to administer the law, the courts should not now ignore it, unless it is palpably wrong: *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cooley v. Board of Wardens*, 12 How. 299; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53.

The construction placed upon the statute by the committee to whom it was referred is not palpably wrong, but, on the contrary, we think, the conclusion it reached is the correct one.

The doctrine that it is within the power of the legislature to prescribe the manner of holding general elections, and to prescribe the mode in which the electors shall express their choice, is too familiar to call for the citation of authority.

In this instance it has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot. There is nothing unreasonable in the requirement, and it is simple and easily understood. Furthermore, if he is illiterate, or is in doubt, the law makes ample provision for his aid. If he does not choose to indicate his choice in the manner prescribed by law, he cannot complain if his ballot is not counted: *Kirk v. Rhoads*, 46 Cal. 399.

If we hold this statute to be directory only, and not mandatory, we are left entirely without any fixed rule by which the officers of election are to be guided in counting the ballots. If ballots are to be counted when no square is stamped, at what distance from the square shall the stamp be placed before it can be rejected?

One board of election may reach one conclusion as to a class

of ballots where the squares are not stamped, and another board may reach another and different conclusion as to the same class; and thus uncertainty and confusion prevail in a matter which the legislature intended, we think, should be certain.

By an act of the general assembly approved March, 6, 1891 (Acts 1891, p. 124), section 45 of the act now under consideration was amended so that a stamp placed upon a ballot which does not touch a square thereon is declared to be a distinguishing mark, and the ballot is not counted.

This amendment was intended, we think, to make certain that which prior to its passage was left, in some measure, to construction, but it only makes certain that which was intended by the legislature when it passed the original section.

But little, if any, aid can be derived from the adjudged cases under the English and Canadian statutes, by reason of the marked difference between those statutes and the one we are now considering, but the cases under those statutes hold that unless there is a substantial compliance by the electors with the provisions of the statute, the ballot cannot be counted: *Hazwell v. Stewart*, 1 Ct. of Sess. 925; *Robertson v. Adamson*, 3 Ct. of Sess. 978; 20 Journal of Jurisprudence, 402-407; *Grant v. McCallum*, 12 Can. Law Jour. 113; *Olmstead v. Carpenter*, Hodg. Can. Elec. Cas. 531; *Hawkins v. Smith*, 8 Can. Sup. Ct. 676; Thornton's Indiana Municipal Law, sec. 4709 a.

Each ballot constitutes a separate and distinct written instrument, and, like all other written instruments, its construction is for the court. Of the 154 ballots appearing in the record before us, not to exceed nineteen could by any possibility be counted for either the appellant or Stockfleth. In order that the elector may have his ballot counted at all, he must touch some one of the squares with the stamp. He can indicate his choice in no other manner, for this is the only mode prescribed by the law. He cannot stamp his ballot elsewhere, and leave the election board to guess at his intention.

In our opinion, the court erred in admitting in evidence, in support of the issue tendered by the appellee, ballots, no square upon which had been touched with the stamp. It follows, also, that the facts above set out are not supported by the evidence in the cause, for ballots not so stamped are not evidence that the elector intended to vote for either of the candidates for county auditor.

It appears from the record before us that in two of the pre-

cincts in Vanderburgh County the initials of the poll-clerks were indorsed upon the lower right-hand corner of the back of the ballots, instead of on the lower left-hand corner, as prescribed by section 34 of the election law. They were all indorsed in the same way. There was no fraud, no intentional violation of the law, but an innocent, honest mistake on the part of the election officers.

It is contended that these ballots should not have been counted, for the reason that the ballots were not indorsed as prescribed by the statute, and that the provisions of the statute requiring the ballots to be indorsed by the poll-clerks at a particular place named is mandatory, while it is contended, on the other hand, that such requirement is directory only.

The general rule is, that mere irregularities on the part of election officers, or their omission to observe some merely directory provision of the law, does not vitiate the election.

Much difficulty, however, is often experienced in determining whether the provisions of a particular statute are mandatory or directory. If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts, whose duty it is to enforce the law as they find it, must so hold, whether the particular act in question goes to the merits or affects the result of the election or not; for such a statute is mandatory, and the court cannot enter into the question of its policy. On the other hand, if a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits: *McCrary on Elections*, sec. 190; *Barnes v. Board etc. of Pike Co.*, 51 Miss. 305; *Wheelock's Case*, 82 Pa. St. 297; *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 53 Mo. 350; *Jones v. State*, 1 Kan. 273; *Gilleland v. Schuyler*, 9 Kan. 569.

In the case of *Gilleland v. Schuyler*, 9 Kan. 569, it was said by the court: "Questions affecting the purity of elections are, in this country, of vital importance. Upon them hangs the experiment of self-government. The problem is to secure,—1. To the voter a free, untrammelled vote; and 2. A correct record and return of the vote. It is mainly with reference to these two results that the rules for conducting elections are prescribed by the legislative power. . . . To hold

these rules all mandatory, and essential to a valid election, is to subordinate substance to form, the end to the means. Yet, on the other hand, to permit a total neglect of all the requirements of the statute, and still sustain the proceedings, is to forego the lessons of experience, and invite a disregard of all those provisions which the wisdom of years has found conducive to the purity of the ballot-box. Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials should not be permitted to disfranchise a district."

So it has often been held by this court that a departure from the mode of holding an election as prescribed by statute, which does not deprive legal voters of their right to vote, or permit illegal voters to participate in the election, or cast uncertainty on the result, does not affect the validity of the election: *Gass v. State*, 34 Ind. 425; *Lafayette etc. R. R. Co. v. Geiger*, 34 Ind. 185; *Dobyns v. Weadon*, 50 Ind. 298; *Mustard v. Hoppess*, 69 Ind. 324; *Duncan v. Shenk*, 109 Ind. 26.

Judge McCrary, in his work on elections, section 93, says: "The principle is, that irregularities which do not tend to affect the results are not to defeat the will of the majority. . . . The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents."

Section 34 of the election statute provides that "at the opening of the polls, after the organization of and in the presence of the election board, the inspector shall open the packages of ballots in such a manner as to preserve the seals intact. He shall then deliver to the poll-clerk of the opposite political party from his own, twenty-five each of the state and local ballots, and to the other poll-clerk the stamps for marking the ballots. The poll-clerks shall at once proceed to write their initials, in ink, on the lower left-hand corner of the back of each of said ballots, in their ordinary handwriting, and without any distinguishing mark of any kind. As each successive elector calls for a ballot, the poll-clerks shall deliver to him the first signed of the twenty-five ballots of each kind; and the inspector shall immediately deliver to the poll-clerks another ballot of each kind, which the poll-clerk shall at once countersign, as before, and add to the ballots already countersigned, so that it shall be delivered for voting after all of those theretofore countersigned."

The sections following provide for the manner of conducting the election until the close of the polls.

at their own expense, and after a careful review of some of the authorities above cited, the court of appeals reached the conclusion that the ordinance was valid as a reasonable exercise of the police power of the state.

The principles which rule the cases above cited cannot, in our opinion, be distinguished from the principles which rule the case at bar. Of course, it is not claimed that in the exercise of the police power such assessments could be made and collected from the abutting property owner unless he had a special interest and derived a special benefit therefrom not enjoyed by the public in general, but if he has a special interest in the improvement of the street and sidewalk, and in keeping them free from snow and ice, so he has a special interest in keeping them free from accumulating filth. It is matter of common observation, of which we must take notice, that property located upon well-improved streets kept clean is more desirable than property on unimproved streets, where mud and filth are permitted to accumulate and obstruct their use. It is safe to assert, we think, that keeping a street clean adds to the rental if not to the permanent value of property located thereon; and for this reason, among others, the abutting property owner has a special interest in such cleaning not enjoyed by the general community. For the reason that the public in general has an interest in keeping the streets free from filth, the city may, in exercising the police power conferred upon it by the state, order them swept; and for the further reason that the abutting property owner derives a benefit from such sweeping not enjoyed by the general public, he may be required, by assessments, to pay the expenses incident to such sweeping.

It follows from what we have said that the assessments provided for by the act under consideration do not amount to a taking of private property without compensation and without due process of law.

Assessments of the kind we are now considering are made upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they can be sustained.

If the property owner is fully compensated for his outlay in the enhanced value of his property, we see no reason why he may not be taxed generally, also, with the balance of the pub-

lic for cleaning other streets in which the public alone have an interest, and which are not, and indeed cannot be, swept as the streets upon which his property abuts. We are not able to perceive how such a tax would be unjust or inequitable, inasmuch as he receives as much benefit therefrom, in contemplation of law, as any other member of the community. As he has been fully compensated for his outlay in sweeping the street upon which his property is situated, he should not be heard to complain of such payment when called upon to bear his portion of other public burdens.

Nor do we think the fact that the statute contemplates the sweeping of the crossings renders it invalid. It cannot be said that the property owners do not receive a special benefit from keeping them clean. Sweeping the street in front of the property would be of little benefit if filth and rubbish were permitted to accumulate upon the crossings, so as to render them unfit for use. If the property does in fact receive a special benefit from sweeping the crossings, there is no reason why those who are thus benefited should not pay the expense.

Having carefully examined all the objections urged against the validity of so much of the statute as is here called in question, we have reached the conclusion that it is not unconstitutional, and that the court did not therefore err in overruling a demurrer to the complaint before us.

Judgment affirmed.

TAXES AND ASSESSMENTS — DISTINCTION BETWEEN. — Taxation and assessment are regarded as distinct modes of raising money for different purposes, and founded upon different principles. Taxation is a general burden imposed for supporting the government, and the revenue raised is expended for the equal benefit of the public at large. Assessment rests upon the taxing power, but is a distinct and well-known mode of laying a local burden upon particular property with reference to a special benefit to be derived by such property: *Hill v. Higdon*, 5 Ohio St. 243; 67 Am. Dec. 289, and note; note to *People v. Mayor*, 55 Am. Dec. 289; see *Bridgeport v. New York etc. R. R. Co.*, 36 Conn. 255; 4 Am. Rep. 63. As to what is a tax, see extended note to *New Orleans v. Great Southern Tel. Co.*, 8 Am. St. Rep. 506; also note to *McCord v. Pike*, 2 Am. St. Rep. 94, in which the purposes of taxation are discussed. As to what are assessments, and the purposes for which levied, see note to *Zigler v. Menges*, 16 Am. St. Rep. 371. An ordinance requiring every person on a certain street to lay a pavement in front of his lot, or in default, requiring the constable to do so and bring an action against the owner for costs, is not a tax: *Mayor v. Maberry*, 6 Hunph. 368; 44 Am. Dec. 315. To the same effect, see *Goddard, Petitioner*, 16 Pick. 504; 28 Am. Dec. 259, and note. A constitutional provision requiring taxation to be equal and uniform and *ad valorem* relates to taxation for revenue, and not to assessments by municipalities for local improvements: *Davis v. Lynchburg*, 84 Va. 861;

any showing to the contrary, the presumption is, that these ballots were placed in the wrong box by the mistake of the election officers.

Judge McCrary, in his work on elections, section 196, says: "It is a rule, well grounded in justice and reason, and well established by authority and precedent, that the voter shall not be deprived of his rights as an elector, either by the fraud or the mistake of the election officer, if it is possible to prevent it."

The case of *People v. Bates*, 11 Mich. 362, 83 Am. Dec. 745, is much in point here. In that case an election was held for state and county and for city officers on the same day and at the same polls. One ballot-box was used for the reception of the ballots cast for state and county officers, and another ballot-box was used for the reception of ballots cast for city officers, but the same judges and inspectors conducted both elections. When canvassing the vote, it was ascertained that some of the votes cast for city officers had been deposited in the box used for the reception of the ballots cast for state and county officers. It was held that the ballots so found in the box prepared for the reception of the ballots cast for state and county officers should be counted for the city officers for whom they were cast. The supreme court of Michigan said: "The two elections, though held upon the same day, were in law distinct and independent of each other, as much as if they happened on different days; and it is, in fact, only in each alternate year that they can occur together. But though thus distinct, and the ballots to be deposited in separate boxes, yet as both were held together under the supervision of the same inspectors, with both boxes before them for the reception of ballots, the inspector receiving the ballot might be liable, by honest mistake, occasionally to deposit a ballot in the wrong box; and if he understood that the ballots found in the wrong box were in no case to be counted, he might do the same thing for a fraudulent purpose. But the elector is not to be deprived of his vote, either by the mistake or fraud of the inspector in depositing it in the wrong box, if the intention of the voter can be ascertained with reasonable certainty. To hold otherwise would be to give more effect to the letter than to the manifest purpose of the statute."

In this case, as in all others, it is an easy matter to ascertain whether the local ballots in the two boxes exceed the

number of votes cast by the legal voters of the precinct by comparing the number with the poll list.

There are some other questions of minor importance discussed by counsel in their able briefs in this case, but as they may not arise upon another trial of the cause, we deem unnecessary to decide them now.

Judgment reversed, with directions to the circuit court to grant a new trial.

STATUTES — CONSTRUCTION. — Where persons whose duty it is to execute a law have uniformly given it a certain construction, and this construction has been acquiesced in and acted upon for a long time, it will command the attention of the courts, and will be followed, unless manifestly wrong: *Kelly v. Multnomah County*, 18 Or. 356.

STATUTES — WHETHER MANDATORY OR DIRECTORY: See *Bowen v. Minneapolis*, 47 Minn. 115; 28 Am. St. Rep. 333, and note, with cases collected. It is only those provisions of the election laws as are made essential prerequisites to the validity of an election that are mandatory; all others are merely directory: *Russell v. McDonald*, 83 Cal. 70.

STATUTES — HOW CONSTRUED. — Every statute should be construed, not according to the letter, but according to the meaning, and the intention must govern, although such a construction would not agree with the letter of the statute: *Rutledge v. Crawford*, 91 Cal. 526; 25 Am. St. Rep. 212. For the general rules relating to the construction of statutes, see note to *Standard etc. Co. v. Attorney-General*, 19 Am. St. Rep. 403. It is a familiar canon of construction, that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it is within the intention of the makers: *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819, and extended note. Where words indicating a general intent are inconsistent with those expressing a particular intent, the particular intent must be taken as an exception to the general intent, so that all the parts of the law may stand: *Howard Oil Co. v. Davis*, 76 Tex. 630. A doubtful remedial statute will be construed to suppress the mischief and advance the remedy: *Toomy v. Dunphy*, 86 Cal. 639. Courts will construe a doubtful statute, so as to promote equity and justice: *Lake Shore etc. R'y Co. v. Cincinnati etc. R'y Co.*, 116 Ind. 578. Courts will supply by judicial construction what is palpably omitted from a statute: *Monaghan v. State*, 66 Miss. 513; *Randall v. Richmond etc. R. R. Co.*, 107 N. C. 748. Courts are not permitted to extend the body of an act by reference to its title, but the title may be considered for the purpose of determining what was within the contemplation of the legislature: *Soby v. People*, 134 Ill. 66.

ELECTIONS — POWER OF THE LEGISLATURE TO REGULATE. — The legislature has undoubted power, under the constitution, to regulate elections, so long as it merely regulates the exercise of the elective franchise, and does not deny such franchise either directly or by making it so difficult or inconvenient as to amount to a denial: *DeWalt v. Bartley*, 146 Pa. St. 529; 28 Am. St. Rep. 814, and note.

ELECTIONS — EFFECT OF IRREGULARITIES BY ELECTION OFFICERS. — Irregularity in the conduct of an election which deprives no voter of his rights,

nor admits a disqualified person to vote, nor casts any uncertainty upon the result, and which has not been occasioned by one seeking to benefit by it, will be overlooked: *De Berry v. Nicholson*, 102 N. C. 465; 11 Am. St. Rep. 767, and note; see also *Lawrence v. Ingersoll*, 88 Tenn. 52; 17 Am. St. Rep. 870. Mere irregularities of election officers which do not affect a voter's right, nor the purity of the election, and not made in reference to matters made mandatory by law, do not invalidate an election: *Fullwood v. State*, 67 Miss. 554. Mere irregularities in returning the ballots and poll lists, in the absence of fraud, will not necessarily vitiate the returns: *Kellogg v. Hickman*, 12 Col. 256.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

MOTT v. CHERRYVALE WATER AND MANUFACTURING COMPANY.

[48 KANSAS, 12.]

WATER COMPANIES — PRIVACY OF CONTRACT. — When a city makes a contract with a water company to furnish water to extinguish fires, there is no privity of contract between such company and the residents of the city, and the latter, therefore, cannot recover of the company for damages resulting from a breach of its contract, though one of the stipulations of the contract is that the company will pay all damages that may accrue to any citizen of the city by reason of the failure on the part of the company to supply a sufficient amount of water, or a failure to supply water at a proper time, or by reason of any other negligence.

Mechem and Smart, for the plaintiff in error.

John W. Deford, for the defendant in error.

HORTON, C. J. B. H. Mott brought his action against the Cherryvale Water and Manufacturing Company for seven hundred dollars damages. He alleged in his petition that the defendant is a corporation having the right to construct, maintain, and operate a system of water-works in the city of Ottawa, in this state, and has carried on that business under an ordinance enacted by the mayor and council of said city; that on May 2, 1887, he was a citizen and resident of Ottawa, and owned personal property, then in his place of business, on block 71, which was, on that day, burnt up without his fault; that it was, by the terms of said ordinance, defendant's duty to furnish a water-pressure of sixty-five pounds within seven minutes after a fire alarm, seventy-five pounds within ten minutes, and thereafter, during the fire, a sufficient supply for fire protection; the alarm to be given by the bell, such

pressure to be determined by the register in the engine-house; that defendant agreed, by the terms of the ordinance, "that it would pay all damages that might accrue to any citizen of the city by reason of a failure on the part of defendant to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence of the defendant"; that the alarm was given at 1:45, A. M., but defendant failed and neglected, within seven minutes thereafter, to furnish a water-pressure of sixty-five pounds, and within ten minutes a pressure of seventy-five pounds, and thereafter, during the fire, a sufficient supply of water for fire protection; that by reason thereof, his goods were consumed by the fire. Defendant answered, admitting that it was a corporation, as alleged; denying "all and singular" the other allegations of the petition, and averring "that there is, and always was, a total want of consideration for the supposed and pretended contract alleged in the petition." Upon the trial, a verdict was rendered for the plaintiff for two hundred dollars. Defendant filed its motion for a new trial, which was granted. The plaintiff excepted, and brings the case here.

The trial court, in granting the motion for a new trial, ruled that the clauses of the contract and ordinance between the water and manufacturing company and the city of Ottawa did not give the plaintiff a right to recover the damages alleged in his petition, there being no privity of contract between him and the city of Ottawa, and no legal obligation from the city to the plaintiff upon which it could contract for indemnity. The ruling of the trial court is fully sustained by the great weight of the authorities,—by all, or nearly all, of the decisions. The fact that a city levies and collects a tax to be paid to a water company does not create any privity of interest between the water company and a citizen or a resident of the city. In making such contract, the city discharges one of its duties for which it was created, and in raising the required money it only provides the consideration due from it by virtue of the contract. A water company could not proceed directly against a citizen or resident in the first instance for unpaid money due under the contract from the city. "Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed. The law

which authorizes cities to contract with individuals and companies for the building and operating of water-works confers no powers upon a city to make a contract of indemnity for the individual benefit of a citizen or resident of the city for a breach of which he can maintain an action in his own name." Under the powers conferred by the statute upon cities in this state, a city making a contract with a water company to furnish water for fires, etc., is not liable to its citizens or residents on account of the failure of the company to furnish water or to perform the conditions of the contract. If a city is not liable to its citizens or residents, the water company is not liable to such citizens or residents upon a contract between it and the city. The contract in such a case is between the city and the water company only: Gen. Stats. 1889, pars. 1401, 1402; *Becker v. Keokuk Water Works*, 79 Iowa, 419; 18 Am. St. Rep. 377; *Davis v. Clinton Water Works Co.*, 54 Iowa, 59; 37 Am. Rep. 185; *Van Horn v. City of Des Moines*, 63 Iowa, 447; 50 Am. Rep. 750; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; 33 Am. Rep. 1, and note 5-9; *Fowler v. Athens City Water Works Co.*, 83 Ga. 219; 20 Am. St. Rep. 313; *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195; *Weet v. Village of Brockport*, 16 N. Y. 161, note; *Foster v. Lookout Water Co.*, 2 Lea, 42; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Blake v. Ferris*, 5 N. Y. 48; 55 Am. Dec. 304; *Exchange Bank v. Rice*, 107 Mass. 37; 9 Am. Rep. 1; *Ferris v. Carson Water Co.*, 16 Nev. 44; 40 Am. Rep. 485, and cases there cited.

In several cases it has been held that a city is not liable for its neglect in cutting water off from a hydrant, but for which the fire might have been extinguished: *Tainter v. Worcester*, 123 Mass. 311; 25 Am. Rep. 90; *New Orleans v. Crescent Mut. Ins. Co.*, 25 La. Ann. 390; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444. This action is not based upon a breach of a statutory duty, but upon the failure of the water and manufacturing company to comply with a contract made with the city of Ottawa. It is not charged in the petition that the plaintiff is a tax-payer, or has ever paid any taxes in Ottawa. It is alleged, however, that he is a citizen and resident of Ottawa, and at the time of the fire was the owner and in possession of personal property, consisting of clothing, household fixtures, furniture, etc., of the value of seven hundred dollars.

There is no claim that this is an action *ex delicto*. In sup-

port of the contention of the plaintiff, the case of *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, is referred to. That case differs from this. In that case there was an express contract, set out in the petition, between the lumber company and the water-supply company, by which, in consideration of rent paid for the use of the two hydrants on its own lot, water was agreed to be furnished directly to the lumber company. In referring to the decision in that case, Mr. A. C. Freeman, the law-writer, and one of the editors of the *American Decisions*, says "that the Kentucky court took a different view and reached an opposite conclusion from the other courts by which the question has been considered and determined": 18 Am. St. Rep., note 380, 381.

The judgment of the district court will be affirmed.

WATER COMPANY'S LIABILITY TO CITIZENS FOR INSUFFICIENT SUPPLY OF WATER. — The principal case is in line with all the authorities, with one exception, mentioned by the court, viz., *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340; 25 Am. St. Rep. 536: See note to *Britton v. Green Bay etc. Water Works Co.*, 29 Am. St. Rep. 863. The present decision, however, seems to be much stronger than any of its predecessors, for the water company had agreed to "pay all damages that may accrue to any citizen of the city by reason of a failure on the part of the company to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence of the water company." The court therefore decides, not merely that a contract made in general terms between the municipality and the water company cannot inure to the benefit of the individual citizens, but that even the attempt to create a liability in favor of such citizens, by means of express words inserted in the ordinance which grants the water company its privileges, cannot succeed, for the reason that such a proceeding is *ultra vires*. If this ruling is accepted as correct, one of the alternative methods which were proposed in our note to *Britton v. Green Bay etc. Water Works Co.*, 29 Am. St. Rep. 863, for the purpose of remedying the somewhat unsatisfactory condition of affairs, which deprives the injured citizen of all redress, must apparently be considered impracticable. Since the insertion of an express provision in the contract will not avail, there seems to be no resource but legislation conferring the necessary powers upon the corporation. Whether the court would have allowed an action to be sustained by the corporation for the benefit of the citizen is not apparent; but even if we suppose that such a remedy would be theoretically available, it would manifestly be quite inadequate to meet the practical necessities of the case, for the citizen would have no means of compelling the corporation to sue. Indeed, it is evident that if he had such means of compulsion at his command, his position would virtually be the same as if he were allowed to sue in his own name, — a result which is so repugnant to the simple and straightforward methods of modern procedure that it can hardly be supposed to be within the contemplation of the court.

LONG v. CHICAGO, KANSAS, AND WESTERN RAIL-ROAD COMPANY.

[48 KANSAS, 22.]

MASTER'S LIABILITY FOR SERVANT'S COMMUNICATING A CONTAGIOUS DISEASE.

— A railway corporation is not liable to one contracting small-pox from its ticket agent when visiting its office for the purpose of purchasing a ticket, if the corporation had no knowledge that its agent was afflicted. The negligent or accidental act of the agent in imparting the contagious disease to the purchaser of the ticket was not within the scope of his employment, so as to charge his principal.

Patterson and Whittinghill, and William Mumford, for the plaintiff in error.

George R. Peck, A. A. Hurd, and Robert Dunlap, for the defendant in error.

HORTON, C. J. The facts in this case are substantially as follows: Chester D. Long went to the small station of Anness, on the defendant's line of railroad, to purchase a ticket to take passage on its road. In doing so he came in contact with one Clayton, the agent who was selling tickets at that station, and he charges that Clayton at the time was afflicted with the contagious disease of small-pox, a fact which Clayton either knew or might have known at the time, and that by reason of coming into close proximity with Clayton, the plaintiff contracted the disease and suffered from the same. Subsequently, Long, by his next friend, Major C. Long, brought his action to recover twenty thousand dollars damages, alleged to have been suffered by him. The railroad company filed a demurrer to the petition, which the court below sustained. Complaint is made of this ruling.

It is the rule that where the owner of a house, office, or other tenement, knowing that it is so infected by the small-pox, or any other contagious disease, as to be unfit for occupation, and to endanger the health and lives of the occupants, and concealing this knowledge from the person invited, induces him to hire, occupy, or visit it, and the person so hiring or invited takes a disease by reason of the infection, the owner is guilty of actionable negligence. In such a case, however, it must be shown that the owner knew that the house, office, or tenement was so infected as to endanger the health or life of any person who might visit or occupy it. Knowledge is an element in the intent essential to liability: Bishop on Non-

Contract Law, sec. 502; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Minor v. Sharon*, 112 Mass. 477; 17 Am. Rep. 122; *Cesar v. Karutz*, 60 N. Y. 229; 19 Am. Rep. 164; *Smith v. Baker*, 20 Fed. Rep. 709; *Gilbert v. Hoffman*, 66 Iowa, 206; 55 Am. Rep. 263. In this case it is not charged that the railroad company or any of its superior officers knew that its agent at Anness was afflicted with any disease, contagious or otherwise. We do not think that a master or a railroad company is liable in damage to a third person because such person has contracted a contagious or infectious disease from an agent, when the master or company has no knowledge that the agent is afflicted. Proof of *scienter* is necessary.

An insane person is civilly liable to make compensation in damages to persons injured by his acts. An innkeeper who was insane was held liable for not keeping the goods of his guest safely: *Cross v. Andrews*, 2 Cro. Eliz. 622. See also Cooley on Torts, sec. 99, p. 115; 11 Am. & Eng. Ency. of Law, 144. Insanity is a disease, but a master or railroad company will not be liable for such infirmity in an agent, having no knowledge thereof: Story on Agency, sec. 8; and see Pope on Lunacy, 340; Russell on Mercantile Agency, 5; 8 Jarman and Blythewood on Conveyancing, 10; Buswell on Insanity, sec. 313. But if one knowingly employs an insane person as his servant or agent, he will be liable for damages to innocent third persons resulting from acts done by the insane person in the scope of his employment: Buswell on Insanity, sec. 257. The *scienter*, however, must be shown. The employment, knowingly, of an improper person to come in contact with the public as an agent would be gross misconduct; but if the master or railroad company is faultless in regard to employing an agent and in continuing his employment, the master or railroad company ought to be excused civilly from the consequences of any secret disease or like infirmity of the agent, in the absence of all knowledge thereof. Even a dog which has manifested no vicious propensities may be kept by its owner without being tied, or otherwise secured; but if the animal is vicious, and the owner has been notified of the fact, a duty is then imposed upon him to keep the animal secure, and he is responsible for any mischief, if he fails to observe this duty. The *scienter* must be established.

Chester D. Long was lawfully in the station at Anness, and was without fault on his part in purchasing his ticket of Clayton, the agent; and in selling his ticket, Clayton was acting

clearly within the scope of his employment; but his disease was not known to the railroad company, or any of its superior officers, and although it was contemporaneous with his employment, the railroad company cannot be charged with the consequences thereof. The negligent or accidental act, if any, of the agent in imparting a contagious disease to Long, the purchaser of the railroad ticket, was not within the scope of his authority, so as to charge the company, his master. The sickness of an agent with a contagious disease cannot be presumed to be authorized or directed by the master, and is not an incident in any way to the employment of selling tickets, or acting as agent at a station.

We are not referred to any decisions, and we cannot find in the books where a master or railroad company has been held liable in a case like this.

The judgment of the district court will be affirmed.

MASTER'S LIABILITY FOR SERVANT'S ACTS. — The master is liable for such acts of his servants only as are within the line of his duty: *Baker v. Kinsey*, 38 Cal. 631; 99 Am. Dec. 438. Master is not liable for the act or neglect of his servant when doing something which the master has not ordered done: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751.

HUTCHINSON AND SOUTHERN RAILROAD COMPANY v. BOARD OF COMMISSIONERS.

[48 KANSAS, 70.]

RAILROAD-AID BONDS, ESTOPPEL TO CONTEST VALIDITY OF. — A township is estopped from claiming that a petition for a special election was not signed by the requisite number of tax-payers, if the fact that it was so signed is entered on the journals of the board of county commissioners in ordering the election, and an election is thereafter had at which the proposition to issue bonds is carried, and they are afterwards issued in due form, containing all the recitals required by law, in consideration of which the railroad is located, constructed, equipped, and operated, without objection or protest from any of the citizens of the township.

ESTOPPEL. — LACHES ON THE PART OF TAX-PAYERS OF A MUNICIPALITY in objecting to or resisting a public improvement, or the issuing of municipal bonds in aid of a railroad corporation, may estop them from afterwards denying liability for such improvement, if during their inaction a contractor or other person has incurred liabilities or made expenditures in good faith, or the bonds have passed into the hands of bona fide purchasers.

RAILROAD-AID BONDS. — A FINDING ON THE PART OF COUNTY COMMISSIONERS that the preliminary steps required by law, such as a petition signed

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by two fifths of the tax-payers, or election, and a majority vote, have been taken is conclusive in favor of a railroad corporation which accepts bonds or a subscription based upon such finding.

ESTOPPEL — MUNICIPAL CORPORATIONS. — The doctrine of estoppel has been extended to municipal corporations as to matters within the scope of their powers and the powers of their officers, so as to bind them by their own acts and acquiescence, and the acts and acquiescence of their officers, whenever an estoppel would exist in the case of a natural person.

George R. Peck, A. A. Hurd, C. N. Sterry, W. M. Whitelaw, and W. M. Wallace, for the plaintiff.

George W. Cooper and John W. Cooper, for the defendants.

SIMPSON, C. This is an original proceeding in *mandamus*, instituted by the Hutchinson and Southern Railroad Company, to compel the board of county commissioners and county clerk of Kingman County to issue the bonds of Richland township, in Kingman County, in the sum of thirteen thousand dollars, to the plaintiff. These bonds were voted by Richland township on the twenty-seventh day of November, 1889, to the Omaha, Hutchinson, and Gulf Railway Company, under the laws of the state of Kansas, as aid to such company in the construction of its railroad through Richland township. The Hutchinson and Southern Railroad Company, having purchased the railroad property, real and personal, and all the rights, privileges, franchises, etc., of the Omaha, Hutchinson, and Gulf Railway Company, now claims these bonds as such purchaser and assignee. The defendants claim that the plaintiff is not now entitled to such bonds, and ought not to prevail in this suit, for four reasons: 1. Because the petition on which the bond election of November 27, 1889, was held did not contain two fifths of the resident tax-payers of Richland township; 2. Because the notice of the election was defective; 3. Because the Omaha, Hutchinson, and Gulf Railway Company sold out to the Hutchinson and Southern Railroad Company, and the Hutchinson and Southern Railroad Company could acquire no right to such bonds under such sale; 4. That no demand was made on defendants by plaintiff for the bonds before suit was brought.

Plaintiff contends that two fifths of the resident tax-payers of Richland township did sign the petition on which the election was called; that due and proper notice of such election was given, but that if the notice was defective, it was an irregularity which was cured by actual notice to the voters of the township, and a very full vote; that the plaintiff has the

right to demand the bonds as purchaser from the Omaha, Hutchinson, and Gulf Railway Company; that proper demand, oft repeated, was made by plaintiff for the bonds, which was as often refused; that even if two fifths of the resident tax-payers of Richland township did not sign the petition on which the bond election was called and held, defendants are now estopped from raising any such question.

The original writ in this cause contained the averments that on the eighteenth day of October, 1889, a petition (which is fully set out in the writ), signed by more than two fifths of the resident tax-payers of Richland township, was presented to the board of county commissioners of Kingman County, praying that such board call an election for the purpose of submitting to the voters of Richland township the question of voting aid to the Omaha, Hutchinson, and Gulf Railway Company; that said board duly considered said petition in special session, and determined and found that said petition was signed by two fifths of the resident tax-payers of Richland township, called the election prayed for in said petition, to be held in Richland township on the twenty-seventh day of November, 1889, and ordered the sheriff of Kingman County, Kansas, to give due notice thereof; that said sheriff did give due notice of such election, by proclamation duly published, etc.; that all the voters of said township also had actual notice of such election and attended the polls on the twenty-seventh day of November, 1889, and voted, without exception, at said election; that a large majority of such voters voted for the bonds; that the board of county commissioners of Kingman County duly canvassed the returns of said election and declared the result to be that a majority of the votes polled at said election were in favor of the issuance of the bonds, and ordered the county clerk of Kingman County to subscribe to the capital stock of the Omaha, Hutchinson, and Gulf Railway Company, for and in behalf of said Richland township, in the sum of thirteen thousand dollars, the amount voted at said election, and that said county clerk did duly make its subscription, as ordered by the board of county commissioners. It is also shown that the railroad was completed through the township on the twenty-seventh day of May, 1890, in accordance with the terms of the subscription. The election resulted in favor of the subscription, by a vote of seventy-three for and forty against. This action was com-

menced on the sixth day of December, 1890. Other facts that may be material will be noticed hereafter.

The petition of the resident tax-payers presented to the board of county commissioners praying that an election be ordered recites that "we, the undersigned, your petitioners, being two fifths of the resident tax-payers of the municipal township of Richland, Kingman County," etc. The board of county commissioners, in ordering the special election, entered on their journal this statement, to wit: "And having examined said petition, find that the same was in due form, and was duly signed by more than two fifths of the resident tax-payers of said Richland township, and being regular in all other respects, and the said county commissioners, being so satisfied, do so find."

The second, third, and fourth defenses relied upon by the respondent township are not good, for various reasons. The objection that the notice of election was defective is met by the showing in the record that every legal voter in the township, except one, attended the election and cast his vote, and hence had knowledge of the time and place at which the election was held. The third defense, "because the Omaha, Hutchinson, and Gulf Railroad Company sold out to the Hutchinson and Southern Railroad Company, and the latter company could acquire no right to the bonds under such sale," is met by the decisions of this court in the cases of *Atchison etc. R. R. Co. v. Comm'rs of Phillips Co.*, 25 Kan. 261; *Southern Kansas etc. R. R. Co. v. Towner*, 41 Kan. 72; *Bates Co. v. Winters*, 112 U. S. 325; *Scotland Co. v. Thomas*, 94 U. S. 682; and Gen. Stats. 1889, par. 1269. The fourth defense, that no demand was made by the plaintiff of the defendants for the bonds before the suit was brought, is disposed of by evidence contained in the record.

It seems to us, regarding the legal effect of the recitations in this record, that the petition for the election declares on its face that the signers thereof are resident tax-payers; that the board of county commissioners found and determined that the petition was good, and contained the names of two fifths of the resident tax-payers of the township of Richland; that the election was ordered by reason of that finding and determined by the board; that the election was held, the votes canvassed, and the result declared, and that all this was done without objection or protest from any of the citizens of that township; that the relator presents at least a very strong

prima facie case for the allowance of the peremptory writ, so strong, in fact, that if the writ cannot be granted, it must be that it is because the township has made such a strong showing that the petition was defective, by reason of not being signed by the requisite number of resident tax-payers, as to completely overcome the *prima facie* case. And in relation to this question, some other facts, and some very strong inferences arising from the record, very vigorously reinforce the *prima facie* showing made by the relator. The tax roll of that year is introduced in evidence, and this shows that the number of resident tax-payers in the township of Richland was about seventy. This tax roll was made by the township trustee before any proposition for railroad aid was discussed, or, so far as we know, even thought of, and is therefore free from any suspicion that it was made either in the interest of or adverse to such a proposition. Again, the evidence discloses that there were two factions in the township, and that the resident tax-payers were besieged both in favor of and against signing the petition calling for an election; that the attention of the entire population of the township was called to the subject, and that there was an earnest and determined effort made by both factions; and yet we find that the insufficiency of the petition is first alleged after demand is made for the issue of the bonds. These things are so entirely inconsistent with the claim now made of the insufficiency of the petition, that great weight should be given them.

The writer of this opinion has read somewhat carefully the voluminous mass of evidence taken on both sides of this question, and is inclined to the opinion that upon the whole record the petition is sufficient, but the decision of this case is based upon other facts that are indisputable. Many of these facts have been already referred to, and as they are thoroughly established by the evidence, or stated by both parties in such a manner as to be taken for granted, and as some others are asserted and not disputed, they are to be accepted as controlling. We allude to certain facts, independent of the petition for the election, such as the efforts of one party to secure, and the other to prevent, the required number of resident tax-payers to sign the petition; the presentation of the petition to the board of county commissioners; its allowance; the findings and determination of the board with respect to its form and legality; the holding of the election and almost unanimous participation of the electors of the township in that

election; the canvass and declaration of the result; the subscription of the stock by the county clerk, as authorized by a resolution of the county board; the acceptance of that subscription by the railroad company; the construction and operation of the railroad in accordance with the terms of the subscription; the acceptance and retention by the township treasurer of the amount of capital stock of the railroad company authorized by the subscription. It also appears from the evidence that in consideration of the subscription of Richland township the railroad company adopted a route through the township that required them to make a bend after leaving a village in said township called "Cleveland," and to turn due east near a certain half-section line to a certain point near the center of the township, and then to turn due south and follow a half-section line to near the southern boundary line of the township, and that this made nearly a right angle in the road; that the arrangement as to route was made to satisfy the people of the township; that the company agreed to locate two depots in the township, one at Cleveland and one in the center of the township. The township is only six miles square. The company also agreed to put in two side-tracks. The route was changed from the original intention of the company on account of the subscription of this township; the route adopted by virtue of the subscription was from one and a half to two miles longer and more expensive than the original route adopted by the company; the route through Richland township finally adopted and built and operated would not have been chosen if it had not been influenced and controlled by the expectation of the company to receive the thirteen thousand dollars aid voted by the township. The road was built through the township on a minimum grade of one foot to the hundred, with compensation for all curves. First-class ties were used, 2,640 to the mile, and same number and class in all side-tracks on the main line. First-class steel rails weighing sixty pounds to the yard were laid on the main line and all side-tracks, manufactured at the Alleghany Bessemer Steel Works. The most approved splice-bars — the Sampson splice-bars — and Tudor bolts and spikes were used. The switches were the best that could be bought, and everything connected with the construction was first-class. The road is well drained, and in a word, is a first-class one, and has complied in all respects with the terms of the subscription.

Under this state of facts, can the municipal township urge as a defense to this action that the petition presented to the board calling for an election did not contain the names of two fifths of the resident tax-payers of the township, and that the finding and determination of the board that it did, was incorrect as a matter of fact, and that therefore the contract of subscription was void, for want of power on the part of the board to make it? Every prerequisite of the law affirmatively appearing upon the records to have been complied with, is not the township estopped, under all the circumstances of this case, from denying the illegality of the petition calling the election? It has been held by this court, in the case of *Sleeper v. Bullen*, 6 Kan. 300, that "where a petition for grading a certain street appears to be good on its face, and the city council of the city decides and declares that it is good, and makes a contract under it, and after the grading has been done, and the city has levied a special tax to pay for the same, the city is estopped from denying the validity of its contract, or of denying its liability to the contractors for the grading."

The authorities quoted to sustain this part of the opinion are the cases of *Louisville v. Hyatt*, 5 B. Mon. 199; *Bissell v. Jeffersonville*, 24 How. 287; *Kearney v. Covington*, 1 Met. (Ky.) 339; *Swift v. Williamsburgh*, 24 Barb. 427. Later, it is said by this court, in the case of *Stewart v. Comm'rs of Wyandotte Co.*, 45 Kan. 708; 23 Am. St. Rep. 746: "A land-owner who voluntarily invokes for his benefit the provisions of chapter 214 of the Laws of 1887 for the purpose of improving a county road contiguous to his land, signs, circulates, and presents a petition under the provisions of that statute to the county commissioners, and asks for the improvement subsequently made, lives in the immediate vicinity of the improvement during its entire progress, is present upon the work at different times, knows that the petition is insufficient under the statute, and the improvement greatly enhances the value of his property, much in excess of any tax or assessment attempted to be imposed, is not entitled to an injunction to restrain the collection of such tax or special assessment, although the improvement is made without any authority whatever. A party cannot invite and encourage a wrong, and then ask a court of equity to protect him by an injunction from the consequences of that wrong."

This is supported by *Sleeper v. Bullen*, 6 Kan. 300; *Lee v. Tillotson*, 24 Wend. 337; 35 Am. Dec. 624; *Ferguson v. Lan-*

dram, 5 Bush, 240; 96 Am. Dec. 350; and *Daniels v. Tearney*, 102 U. S. 415; and this case cites *Elliott on Roads and Streets*, 422; *State v. Mitchell*, 31 Ohio St. 592; *Burlington v. Gilbert*, 31 Iowa, 356; 7 Am. Rep. 143; *Motz v. Detroit*, 18 Mich. 526; see also *Brown v. Atchison*, 39 Kan. 87; 7 Am. St. Rep. 515. These cases cited from our own court, as well as the supporting ones, go to the extent that even when the municipality has no power to make the improvement, the lot-owner may, by his own acts, be estopped from asserting that want of power; and some of the supporting cases hold that where a party has availed himself of the benefits of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense. We cite these cases to establish the general rule that courts will carry the doctrine of estoppel to great lengths in the interests of justice, because it has its foundation in a wise and salutary policy. It promotes fair dealing, and often gives triumph to right and justice where no other principle known to our jurisprudence can secure these ends. It is a conservator; and without its frequent operation, vast public and private enterprizes would be paralyzed. The strength of this principle of estoppel has been held sufficient to overcome jurisdictional defects in proceedings of this kind, as in the case of *Prettyman v. Tazewell Co.*, 19 Ill. 406, 71 Am. Dec. 230, where it was alleged that the petition did not contain the requisite number of signatures, and there was not a majority of legal voters in favor of the proposition. Also in the case of *Chicago etc. R. R. Co. v. Coyer*, 79 Ill. 376, where the petition was insufficiently signed; and in the case of *Burlington etc. R'y Co. v. Stewart*, 39 Iowa, 267, where the notice of the election was insufficient; and in *Packard v. Jefferson Co.*, 2 Col. 338, where the election was called at an illegal meeting of the board. In the last case, the court held that the proceedings were without jurisdiction, and void, but that the action of the board at a subsequent regular meeting having treated the proceeding as valid, they were thereby ratified and validated. In the case of *Mills v. Gleason*, 11 Wis. 490, 78 Am. Dec. 721, the court says that a subsequent ratification will render valid acts that in point of strict law were unauthorized when they were done, is a familiar rule in the case of individuals. And the court held that it was equally applicable in that case to estop a city from denying the validity of certain bonds.

And in the case of *Kneeland v. Gillman*, 24 Wis. 39, the court,

speaking of municipal corporations, says: "As to matters within the scope of their power, the doctrine of estoppel applies; and that agreements in their behalf may be ratified by acquiescence and accepting the benefits of them, with knowledge of the facts, is as well settled as in the case of natural persons." And further, in the same opinion, "if all this was done with the knowledge of the common council, and it took no action to express any dissent or to prevent its agents from making the agreement, it is as clearly bound as though it had formally authorized the whole by express act."

This case is expressly affirmed in *Houfe v. Town of Fulton*, 34 Wis. 618, 17 Am. Rep. 463, which is another strong case in support of this doctrine. See also *Curnen v. Mayor of New York*, 79 N. Y. 511. In the case of *Peterson v. Mayor of New York*, 17 N. Y. 449, 453, Judge Davis said: "This ratification may be by acts or conduct inconsistent with any other supposition than that it intended to own and adopt the act as its own." See also Story on Agency, sec. 253; Dillon on Municipal Corporations, sec. 385; *Argenti v. San Francisco*, 16 Cal. 255; *People v. Swift*, 31 Cal. 26; *Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83; 86 Am. Dec. 351; *Hoyt v. Thompson*, 19 N. Y. 208; *Supervisors v. Schenck*, 5 Wall, 782; *Hart v. Stone*, 30 Conn. 94; *Howe v. Keeler*, 27 Conn. 538; *Emerson v. Newbury*, 13 Pick. 377; *Hodges v. Buffalo*, 2 Denio, 110; *Dubuque etc. College v. District Township*, 13 Iowa, 555; *Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Merrick v. Burlington etc. Plank Road Co.*, 11 Iowa, 74; Herman on Estoppel, sec. 554; *Burlington v. Gilbert*, 31 Iowa, 357; 7 Am. Rep. 143; *Cross v. City of Kansas*, 90 Mo. 13; 59 Am. Rep. 1; *Moore v. Mayor*, 73 N. Y. 238; 29 Am. Rep. 134; *Markle v. Board etc. Clay Co.*, 55 Ind. 185.

This court has laid down this doctrine of ratification in the strongest terms. In the case of *State v. Comm'rs of Pawnee Co.*, 12 Kan. 426, 439, the court says: "It is a general principle, of almost universal application, that whenever a state, county, corporation, partnership, or person has power originally to do a particular thing, it also has the power to ratify and make valid an attempted effort to do such thing, although the same may have been done ever so defectively, informally, and even fraudulently, in the first instance. This principle is so elementary in its nature as to require no citation of authorities to uphold it."

Upon the strength of this principle, municipal corporations

have been estopped from denying their liability to pay for benefits received, in some cases, where there was no contract at all; in others, where there was an absence of power even to make the contract: *City of East St. Louis v. East St. Louis Gaslight Co.*, 98 Ill. 415; 38 Am. Rep. 97; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 469; *Hitchcock v. Galveston*, 96 U. S. 341. In the last case the supreme court says: "Having received the benefits at the expense of the other contracting party, it [the city] cannot now object that it was not empowered to perform what it promised in return"; citing numerous cases in support of this proposition.

This court has recognized the rule that requires prompt action on the part of the plaintiff in cases of this kind. In the case of *Comm'rs of Morris Co. v. Hinchman*, 31 Kan. 736, this court says: "It is a well-established rule in equity, that if a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief. Under this rule," says Chief Justice Horton, "it was decided that an injunction will not be granted to restrain the payment of money illegally voted by a town, if the petitioners had been guilty of gross laches, and knowingly have permitted others to incur liability in good faith, relying upon such appropriation for reimbursement"; citing *Tash v. Adams*, 10 Cush. 252. See also *Thomas v. Woodman*, 23 Kan. 217; 33 Am. Rep. 156; *Ritchie v. City of South Topeka*, 38 Kan. 368.

As said by the court in the case of *Kellogg v. Ely*, 15 Ohio St. 67: "When the first spade had been thrust into the earth in the execution of the contract, before the contractors had expended any money or the laborers any sweat, then, if ever, was the remedy by injunction open to plaintiff below; but he did not invoke it. It does not appear from the record that he ever warned the contractors or laborers that he intended for himself to resist the collection of the assessment which must follow to raise the money to pay them, but, remaining inactive and silent until his swamp-lands were drained by a ditch of nearly a mile in length, he then, for the first time, asks the interposition of a court of equity. We think he comes too late." See also *Chapman v. Mad River etc. R. R. Co.*, 6 Ohio St. 137; *State v. Van Horne*, 7 Ohio St. 327; *State v. Union Township*, 8 Ohio St. 394; *Goshen Township v. Springfield etc. R. R. Co.*, 12 Ohio St. 624; 80 Am. Dec. 386; *State v. Goshen Township*, 14 Ohio St. 569; *Comm'rs of Knox Co. v. Nichols*, 14 Ohio St. 260. Judge Redfield, in his work on railways

(vol. 2, 5th ed., p. 388), says: "The right to interfere by injunction is one that should always be asserted on fresh suit, or it will be regarded as voluntarily waived and lost by acquiescence"; citing numerous authorities in support of the proposition.

In 2 Herman on Estoppel, sec. 1221, the author says: "If a party is guilty of laches or unreasonable delay in the enforcements of his rights, he thereby forfeits his claim to equitable relief. This rule is more especially applicable to cases where a party, being cognizant of his rights, does not take those steps to assert them that are open him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character."

Mr. Daniel, in his work on negotiable instruments (vol. 2, sec. 1536), in speaking of the voting of bonds and the subscribing of stock by municipalities to aid in the building of a railroad, says: "The tax-payers of the municipality may also enjoin the proceeding of the corporate authorities to carry out the subscription, on the ground of fraud, bribery, non-fulfillment of pre-existing conditions, or other sufficient cause, but they must do so, if at all, in apt time, and before the rights of *bona fide* third parties have accrued."

In *Brown v. Merrick County*, 18 Neb. 355, the supreme court of Nebraska says: "A tax-payer who seeks to enjoin the payment of money for the erection of a public bridge, which he claims is being constructed in violation of law, must act with reasonable promptness. If he is guilty of gross laches, and knowingly permits the contractor to incur liabilities in good faith in the construction of the greater part of the work, an injunction will be denied."

See also *Lamb v. Burlington etc. R'y Co.*, 39 Iowa, 333, where it was held that because the plaintiff had delayed his action until the railroad was completed (as in this case), he was estopped; and in *Burlington etc. R'y Co. v. Stewart*, 39 Iowa, 267, where the election notices were insufficient, the same principle was applied. In the case of *Prettyman v. Tazewell Co.*, 19 Ill. 406, 71 Am. Dec. 230, it was held that a delay of four months after the election was fatal to plaintiff's right to enjoin the issue of the bonds; that "the presumption was, that rights had been acquired and liabilities incurred on the faith of the bonds that would make it inequitable to restrain their issue." The same principle was recognized in later cases in the same court: See *Johnson v. Stark Co.*, 24 Ill. 90; *But-*

ler v. Dunham, 27 Ill. 474; and *People v. Cline*, 63 Ill. 394; *Chicago etc. R. R. Co. v. Coyer*, 79 Ill. 376. In the Tazewell County case, the supreme court of Illinois held, where it was alleged that hundreds of illegal votes were cast, and that there was not a majority of the legal voters in favor of the subscription, that proceedings of this kind are binding until impeached, and that they might be impeached . . . by establishing a proper case in apt time; but justice and reason would alike prohibit a party, after acquiescing until the road should incur liabilities, acquire credit, etc., on the faith that these bonds would issue, from impeaching the election and enjoining them from issuing."

And the same doctrine has been recognized and affirmed in later cases in that state: *Johnson v. Stark Co.*, 24 Ill. 90; *Marshall Co. v. Cook*, 38 Ill. 48, 51; 87 Am. Dec. 282; *People v. Supervisors of Logan Co.*, 63 Ill. 374; *People v. Cline*, 63 Ill. 394. See also *New Haven etc. R. R. Co. v. Town of Chatham*, 42 Conn. 465; *Gilmore v. Fox*, 10 Kan. 509, 512; *Kellogg v. Ely*, 15 Ohio St. 64; *Chapman v. Mad River etc. R. R. Co.*, 6 Ohio St. 127, 137; *Clapp v. Cedar Co.*, 5 Iowa, 15; 68 Am. Dec. 678; *Markle v. Board etc. Clay Co.*, 55 Ind. 185.

The settled policy of this state, both by legislative enactment and judicial expression, is, that before the agents of a municipality are authorized to subscribe aid for such public improvements as railroads, they are required to be authorized so to do by the public in the manner provided by statute: *Township of Dixon v. Sumner Co.*, 25 Kan. 519. The preliminary steps required by law, such as a petition signed by two fifths of the resident tax-payers, an election, and a majority vote, are steps in the creation of that authority, and are steps with which the railroad company necessarily has no connection: *Land Grant etc. Co. v. Davis Co.*, 6 Kan. 256. Whether these steps have been legally taken is a question that must be determined by the board of county commissioners, who are public agents to whom the determination of many other important questions is confided. Under the terms of our statute, no other tribunal or authority could determine whether a sufficient petition had been presented, or whether there was a majority vote cast for the subscription. When the board acted, and determined in favor of the subscription, and ordered the county clerk to make it, and it was accepted by the railroad company, then for the first time was there a contract which necessarily required action by the railroad company.

Up to this point, all the proceedings affirmatively show on their face that every requisite of the statute had been complied with; and now we quote largely from a case already cited, that of *Bissell v. City of Jeffersonville*, 24 How. 287, — a decision of the supreme court of the United States, decided so long ago, and followed so often, that it is now not assailable. If it should be said that this was a case in which innocent third persons were the holders of the bonds sued upon, the reply is, and it is a patent one, that the court considered the case from the stand-point of the railroad company's rights. The court says: "Having ascertained and determined that three fourths of the legal voters had petitioned, they adopted the resolution reported by the committee, and entered into the contract with the railroad company. Clearly, therefore, the common council had contracted the obligation to take the stock, and in case of refusal, would have been liable in damages for a breach of the contract. . . . It is insisted by the plaintiffs that the defendants had no right to disprove the verity of their own records, certificates, and representations concerning the facts necessary to give validity to the bonds. On the other hand, the defendants controvert that proposition, and insist that it was competent for them, under the circumstances, to prove, by parol testimony, that the records given in evidence did not speak the truth, and that in point of fact three fourths of the legal voters had not petitioned, as required by the charter. Unless three fourths of the legal voters had petitioned, it is clear that the bonds were issued without authority, as by the terms of the explanatory act it could only apply to a case where the common council of a city had contracted the obligation or liabilities therein specified upon the petition of three fourths of the legal voters of such city; and if no such petition had been presented, or if it was not signed by the requisite number of the legal voters, the law did not authorize the common council to ratify and affirm the subscription. The fact, however, had been previously ascertained and determined by the board to which the petition was originally addressed. After the explanatory act was passed, the common council were fully authorized to revise the finding of the former board; and if it did not appear, upon inquiry and proper investigation, that it was correct, it was their duty, as the representatives of the city, to have refused to ratify and affirm the contract for the subscription. Such an inquiry might have been made through the medium of a committee,

as it had been when the petition was presented, or in any other mode satisfactory to the board which would enable them to ascertain the true state of the case. By the terms of the explanatory act, they were authorized to ratify and affirm its subscription, if the obligation or liability incurred had been contracted on the petition of three fourths of the legal voters of the city; and, of course, the necessary implication is, that they must be satisfied that the requisite number had petitioned. . . . Whether three fourths of the legal voters had petitioned or not, was a question of fact; and if not ascertained and conclusively settled before the bonds were issued, it would remain open to future inquiry, and might be determined in the negative; and clearly the common council could not lawfully ratify and affirm the subscription unless that proportion of the legal voters had petitioned; and without such ratification the bonds would be invalid. Beyond question, therefore, that construction must be rejected. Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition, as described in the explanatory act, and of necessity there must be some tribunal to determine whether the petitioners whose names were appended constituted three fourths of the legal voters of the city; else the board could not act at all. None other than the common council, to whom the petition was required to be addressed, is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other, sustaining a similar relation to the city, so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of *Comm'rs of Knox Co. v. Aspinwall*, 21 How. 544, we are of the opinion that 'this board was one, from its organization and general duties, fit and competent to be the depositary of the trust confided to it.' Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint. When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and, *a fortiori*

eri, it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value. Duly certified copies of the record of the proceedings were exhibited to the plaintiffs at the time they received the bonds, showing to a demonstration that further examination upon the subject would have been useless; for, whether we look to the bonds or the recorded proceedings, there is nothing to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to lawful authority; and we hold that the company and their assigns, under the circumstances of this case, had a right to assume that they imported verity. Citation of authorities to this point is unnecessary, as the whole subject has recently been examined by this court, and the rule clearly laid down that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced."

It will be noticed that this case is cited and strongly relied upon by this court in *Sleeper v. Bullen*, 6 Kan. 300; and in the more recent cases of *Burlington Water Works Co. v. City of Burlington*, 43 Kan. 725, *Brown v. Atchison*, 39 Kan. 48, 7 Am. St. Rep. 115, and *State v. Dennis*, 39 Kan. 509, it is very strongly asserted that contracts with innocent persons, made by municipalities, cannot be avoided by defects that are shown outside of the record.

In the case of *Bill v. City of Denver*, decided by Mr. Justice Brewer, and reported in 29 Fed. Rep. 344, there is a decision in harmony with that of *Sleeper v. Bullen*, 6 Kan. 300. It was an action against the city of Denver for services as inspector of sewers; the defense was that it had no power to make such a contract. Justice Brewer comments on this defense, and says: "It is true that its power to proceed in the premises depended upon the petition of a majority of the property owners; but no tribunal is in terms provided to determine whether such petition has been filed; and there being no statutory provision for a tribunal to so determine, when the city council, as the general representative of the city, with power to act thereon, determined by its action that such a petition has been filed, third parties have a right to rely upon that, and say that the city is estopped thereafter to deny that such petition was filed."

We again quote from the supreme court of the United States: "The function of making the subscription and issuing the bonds was confided to the county court. They had jurisdiction over the entire subject. They were clothed with the power and duty to hear and determine. The power was exercised and the duty performed. In this case, as it is before us, the result is conclusive; and the county is estopped to deny that such is the result": *County of Macon v. Shores*, 97 U. S. 279.

It seems clear to us, that, under the authorities, the doctrine of equitable estoppel applies, and should be applied, in this case, but we desire to call attention to some of these authorities, making copious quotations from them, as follows:—

"Corporations, as much as individuals, are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements, and then turn around and disavow their acts, and defeat the just expectations which their own conduct has superinduced": *Railroad Co. v. Howard*, 7 Wall. 392–413.

"It must be further borne in mind, that the invalidity of contracts made in violation of statutes is subject to the equitable exception that although a corporation, in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity, or organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded on it to question its validity": *Township of Pine Grove v. Talcott*, 19 Wall. 666–678; *National Bank v. Matthews*, 98 U. S. 621–629.

"The plea of *ultra vires*, as a general rule, will not prevail, whether interposed for or against a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong. . . . It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract": *Whitney Arms Co. v. Barlow*, 63 N. Y. 63; 20 Am. Rep. 504.

"The rule seems to be well established, that where a contract has been executed and fully performed on the part, either of the corporation or of the other contracting party, neither

will be permitted to insist that the contract and such performance by one party were not within the corporate power of the company": *Hays v. Galion etc. Coal Co.*, 29 Ohio St. 330.

"As we understand the rule, *ultra vires* prevails in full force only where the contracts of corporations of this character remain wholly executory. . . . This rule prevails, even as to public or municipal corporations, in analogous cases": *Thompson v. Lambert*, 44 Iowa, 239.

In Ohio, in the case of *State v. Van Horne*, 7 Ohio St. 327, the court states the doctrine very fully: "No objection is interposed by the defendant, either to the legality of the election, or to any irregularity in form or substance of the certificate of the trustees of the township filed in the auditor's office and recorded; nor to the subscription, the issuing of the bonds, their sale, or the receipt of the money from the purchasers of the bonds. But the defendant says that no election could be had until the line of railroad was actually established and located through the township, and that consequently the whole proceedings were unauthorized and void. It is perhaps a question of some doubt whether the general assembly did not intend that the railroad should be actually established through a township before an election; but we do not consider it necessary in the case before us to decide that question, as we are of the opinion that, conceding a location would have been necessary before an election, the acts of the parties interested have been such as to preclude them from denying the authority and power of the trustees of the township to issue the township bonds. If the location of the road should have been first made, any tax-payer of the township, for himself and all others interested, could, at any time before the issuing or negotiation of the bonds, have intervened, and enjoined their issue as unauthorized, on account of the road not having been located. They, however, either intentionally, or from neglect to assert their legal rights, without protest or interference, suffered the election to take place, their public agents, the trustees, to subscribe for stock, to issue the bonds, and receive the proceeds. . . . They now desire to retain the money of the original bond-holders; refuse to pay interest; deny their obligation to pay back the principal; disaffirm the acts of their public agents, who, under the forms of the law, and by their direct instigation, through the ballot-box, issued and negotiated these bonds. They had an opportunity, before innocent third persons could be injured or committed

to the acts of their public agents, to enjoin their proceedings and protect themselves. They did not seek that protection; but now, when they have received all the fruits of the contracts of their agents from third persons who have acted upon their recognition of the authority of their agents, they ask the privilege of denying this recognition, and thus escape from their obligations. It is too late for them to do so as against innocent third persons. They are concluded, not simply by the acts of their public agents, but by their own. It is true that when public officers exceed the powers vested in them by general laws, their acts are no longer official, but void; and this principle would be applicable to the case before us if the trustees had derived their sole authority to make the contract under consideration from the law, without any interposition, sanction, or authority from the tax-payers of the township. But in the case before us the trustees derived their authority to subscribe for the stock of the railroad and to issue the bonds specifically from their constituency, the tax-payers of the township. The trustees, unless authorized by the tax-payers, derive no authority to act from the laws under consideration. In fact, the whole transaction under the legislation was for the purpose of consummating an agreement having all the substantial elements of a private contract between the tax-payers as principals, who by vote made the trustees their agents to contract for them, on one side, and the railroad and the bond-holders on the other. The rules of law applied to individuals, and founded upon the clearest principles of justice and sound morals, should be equally applicable to these parties. The tax-payers, as principals, who, by their votes, under the forms of law, set their agents in motion, professed to clothe them with special authority to make a special contract with third persons for their benefit, by voting, instigated those agents to make the subscription and issue the bonds, and thus induce, on the faith of this recognition, innocent third persons to part with their money and receive in lieu thereof these bonds. If the trustees of the township and the tax-payers supposed until recently, as they probably did, that the subsequent permanent establishment and location of the railroad through the township was sufficient to authorize the issuing of the bonds, whether that location was made before or after the election, it is equally just to presume that the bond-holders who parted with their money entertained the same belief. The one were certainly

as much bound to know as the other; and if both were mistaken, no principle of law or justice would demand that the tax-payers should retain the fruits of the mistake, and at the same time repudiate those very acts of their own which misled the bond-holders, and induced them to part with their money; in truth, blowing hot to get the bond-holders' money, and blowing cold to rid themselves of the obligation to refund it."

This case was followed and approved by the same court in the case of *State v. Union Township*, 8 Ohio St. 394; also by the same court in the case of *Goshen Township v. Springfield etc. R. R. Co.*, 12 Ohio St. 624; 80 Am. Dec. 386. It was also followed and approved in the case of *State v. Goshen Township*, 14 Ohio St. 569. The fourth point in the *syllabus* in the last case is as follows: "Acts of subsequent acquiescence and ratification will estop the township from objecting to the validity of the bonds in the hands of an assignee for value, who has taken them on the faith of such acquiescence, on account of any irregularities attending their execution and issuing, short of such an absence of power, or such an illegality as would render them absolutely void. And notice on the part of the assignee will not defeat the estoppel." See also the case of *Comm'rs of Knox Co. v. Nichols*, 14 Ohio St. 260.

In Missouri, the same doctrine has been asserted in a case between a municipality and a railroad company itself, it being the case of *Hannibal etc. R. R. Co. v. Marion Co.*, 36 Mo. 294, in which case Judge Wagner, speaking for the court, uses the following language: "The rules which regulate the business transactions of life, and which enjoin good faith, honesty, and fair dealing, are alike applicable to individuals and corporations. The county of Marion, to aid a great public undertaking, which was to redound to the interest of its citizens, subscribed stock in a railroad enterprise. Like all other share-holders, it received a certificate of stock, and now retains and holds the same, and continues to enjoy all the benefits derivable therefrom. Upon the strength of that subscription, large sums have been expended, and important investments made. It would be grossly immoral and unjust to allow it to involve others in onerous engagements, and then, after a lapse of ten years' silent acquiescence, repudiate its obligation."

This was approved and followed by the same court in the case of *Steines v. Franklin Co.*, 48 Mo. 167; 8 Am. Rep. 87;

and also in the case *Barrett v. County Ct. of Schuyler Co.*, 44 Mo. 197.

In Pennsylvania the same doctrine is asserted; and in the case much cited in the text-books, to wit, the case of *Alleghany City v. McClurkan*, 14 Pa. St. 83, the court uses the following language: "The charter or act of assembly incorporating the city of Alleghany was not produced or read on the argument; but I take it for granted that it contains no express authority to the corporation to issue such notes as those embraced in this action. But it does not follow that the corporators are therefore not answerable for them in their corporate capacity. They have received value for them, in the various public works and improvements erected and made in the city through their instrumentality, and it hardly comports well with fair dealing that they should seek to exonerate themselves from a debt on this account, contracted by and through their accredited agents, and with their silent acquiescence. It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is power to contract, undoubtedly, and if a series of contracts have been made openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank which has long been in the habit of doing business of a particular description would not be exonerated from liability because such business was not expressly authorized in its charter. The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, when these contracts for a series of times were entered into publicly, and in such a manner as by necessary and irresistible implication to be within the knowledge of the corporators. It was the acquiescence of the corporators, and the habit and custom of business with the corporation, which induced the public to give credit to the scrip or notes, which was evidence of contract. But when, to this circumstance, we add that the corporators themselves received the value of these notes or contracts, in erection of improvements in the city, and enjoyed, and still enjoy, the value of them, the conclusion is irresistible that the corporators ought to pay them by the assessment of taxes on the corporators, if it has no other available means."

Again, in the case of *Commonwealth v. Pittsburgh*, 43 Pa. St. 391, the court says: "Where a subscription to the stock of a railroad company on behalf of the city is authorized by ordinance to be made on certain conditions precedent, the subsequent issue of bonds in payment of the subscription proves the conditions to have been complied with or waived by the city."

This doctrine of equitable estoppel was strongly approved in a very strong opinion in the case of *Town of Bennington v. Park*, 50 Vt. 178. In that case the railroad company that received the bonds was held to be a *bona fide* purchaser for value, on the ground of its right to rely upon the records made by the agents of the town.

In Illinois, the same doctrine is maintained in the cases of *Prettyman v. Tazewell Co.*, 19 Ill. 406; 71 Am. Dec. 230; and *Johnson v. Stark Co.*, 24 Ill. 90. The principles announced in each of these cases were distinctly affirmed in the case of *Butler v. Dunham*, 27 Ill. 474, which was an action brought by taxpayers to enjoin the issuance of bonds; and the same principle finds recognition in the case of *People v. Cline*, 63 Ill. 394. In the case of *City of East St. Louis v. Gaslight Co.*, 98 Ill. 415, 38 Am. Rep. 97, following is the first point in the *syllabus*: "Although there may be a defect in the power of the corporation to make a contract, yet if the contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation will be liable on the contract."

In Wisconsin the same doctrine has been enunciated; and in the case of *Houfe v. Town of Fulton*, 34 Wis. 608, 17 Am. Rep. 463, the following proposition is stated in the opinion of the court: "But of late years, much more than formerly, the doctrine of estoppel — most wholesome and just in its operation when properly applied — has been extended to these municipal corporations, so as to bind and conclude them by their own acts and acquiescence, and the acts and acquiescence of their officers, whenever an estoppel would exist in the case of natural persons. It is now well settled that, as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped, upon the same principles and under the same circumstances as natural persons: *Kneeland v. Gilman*, 24 Wis. 39, 42. . . . The estoppel

in such cases arises from the acts of the town and its officers, performed within their apparent authority, and if they, who ought to know, were deceived and mistaken, it would be most inequitable and wrong to visit the consequences upon innocent third persons who relied upon and were justified in confiding in their action."

In Indiana the same doctrine has received recognition. The city is estopped by the record of the common council, which declares that more than two thirds of the resident freeholders of the city petitioned: *McCulloch v. State*, 11 Ind. 424. In the case of *Munrey v. Joest*, 74 Ind. 413, a party applied to enjoin the assessment of a tax levied to pay for the construction of a drain-ditch, on the ground that there were irregularities in the matter which prevented the officers from rightfully constructing the ditch, such as failure to give certain notices that were required to be given, etc. And the court says: "As the appellant made no objection until after the work had been fully completed, he is not now in a situation to complain of the insufficiency of the notice of the letting of the contract. Having received the full benefit of the work done by the contractor, he cannot now escape payment on the ground that proper notice of the letting of the contract was not given. It is a well-settled rule of equity, that if a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief. The rule is more especially applicable to cases where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character. This doctrine has been adopted and enforced by this court"; citing a number of cases, and cases in other states.

The doctrine is also adopted by the state of New York, as will be shown by the following quotation from the case of *Curnen v. Mayor etc. of New York*, 79 N. Y. 511: "A fact admitted by a municipal corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it, and cannot be withdrawn to the prejudice of one who, in reliance upon it, has changed his position in respect to the matter affected thereby. The doctrine of estoppel applies in such case to a corporation as well as to an individual."

In California the same rule is announced, as will be seen

by the following quotation from the case of *Argenti v. City of San Francisco*, 16 Cal. 256: "As a rule, the powers of corporations must be exercised in the mode pointed out by the charter. But even a want of authority is not in all cases a sufficient test of the exemption of the corporation from liability in matters of contract. An executory contract made without authority cannot be enforced; but where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned."

In 1847 the legislature of the state of Massachusetts enacted the following law: "Whenever any city or town shall have voted to raise, by taxation, or by pledge of its credit, or to pay over from moneys in its treasury, any sum or sums of money for any other purpose or purposes than those for which it may have the legal right and power so to do, the supreme judicial court shall have power, upon the suit or petition of any inhabitants not less than ten of said city or town liable to be taxed therein, briefly setting forth the cause of complaint, to finally hear and determine in equity all such cases; and any justice of said court may, as well in vacation as in term time, issue an injunction and make all such orders and decrees as may be necessary or proper to restrain or prevent any violation or abuse of said legal right and power of such city or town, until the final determination of such causes by the supreme judicial court; and no order or decree of said court, or of any justice therein, shall be discharged or invalidated on account of want of jurisdiction in said court or justice": Stats. 1847, c. 37, sec. 1.

The case of Tash and others against Adams, treasurer, was brought under this statute; and as the case is so applicable, we will quote the entire opinion, which was delivered by Justice Bigelow. The opinion will be found in 10 Cush. 252. "The petition in this case is filed pursuant to the statute of 1847, c. 37, sec. 1, which empowers this court to hear and determine in equity all cases relating to the raising and expenditure of money by towns for any purpose not authorized by law. The petitioners set forth two votes of the town of Natick making appropriations of money for objects alleged to be illegal and unauthorized, and ask for a perpetual injunction against the town and its officers, restraining the payment of any money from the treasury, and prohibiting the pledge of the credit of the town under said votes and appropriations.

It will be necessary, for a just decision of the case, to consider the two votes separately. The first was passed at a meeting of the inhabitants of the town, duly called, on the 18th of September, 1851, and appropriated the sum of five hundred dollars for the celebration of the second centennial anniversary of the settlement of said town, and authorized a committee appointed to arrange the celebration to draw from the treasury of the town an amount not exceeding that sum to defray the expenses thereof. It appears that this committee, acting under this vote, proceeded to make contracts for and in behalf of the town, and expended money, and became liable to pay, on account thereof, a sum amounting to \$463; that the celebration took place on the 8th of October, 1851, under the sanction of the town, and that all the expenditures were made and liabilities incurred prior to that time; that the committee acted in good faith, in strict accordance with the terms of said vote, and in the belief that the town had the legal right and power by law to authorize them to expend money and make contracts in behalf of the town for the purpose aforesaid. It further appears that the petitioners in the present case were inhabitants of said town, and fully cognizant of said vote at the time it was passed, and of the proceedings of the committee under and by virtue thereof; that they took no measures to prevent said committee or said town from acting in pursuance of said vote; that they stood by and permitted said contracts to be made, the credit of the town to be pledged, and said money expended as aforesaid, and after said celebration had taken place, and said committee and other persons had become personally liable to pay money under said proceedings, to wit, on the eighteenth day of October, 1851, the said petitioners made application to this court for an injunction, as above stated. Upon these facts we think it very clear that the petitioners are not in equity entitled to the relief which they seek. So far as relates to this vote and appropriation by the town, assuming that the purpose for which the money was appropriated was illegal, because it was one for which towns are not authorized to incur expenditures or raise money (upon which question we express no opinion), nevertheless the petitioners fail to make out a case entitling them to the interposition of the court. It is a well-established rule in equity that if a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief. This rule is more especially

applicable to cases where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character: 2 Story's Eq. Jur., sec. 959; Drewry on Injunctions, 294. The facts bearing on this part of the case, as presented by the petitioners, bring it very clearly within the operation of this salutary rule. The petitioners not only failed to use due and reasonable diligence in asserting their rights and seeking a remedy, but were guilty of gross laches. With a full knowledge of the vote of the town and the proceedings of the committee, they permitted contracts to be made and expenditures to be incurred, not only by the committee, but by third parties who acted in good faith, relying on the credit of the town. They took no measures to enforce their rights until after the celebration had taken place and innocent parties had come under liabilities which they would not have assumed if the petitioners had seasonably sought redress for the impending grievance. To issue an injunction to restrain the payment by the town of the bills thus incurred would be manifestly most inequitable. So much, therefore, of the prayer of the petition as applies to the vote and appropriation of September 18, 1851, must be denied. That part of the case which relates to the vote of the town passed October 17, 1851, appropriating the sum of five hundred dollars for the celebration of the anniversary of the surrender of Cornwallis, stands upon wholly different grounds. It is not contended that this appropriation was for a purpose for which a town can legally expend money or pledge its credit. It was clearly a violation of law, and without any sanction derived from the usages of towns in this commonwealth. The application for the injunction having been made immediately after the vote was passed, and before any money was expended or liabilities were incurred in pursuance thereof, was seasonably presented. In fact, the case finds that the money actually raised and expended for the celebration was furnished by subscription, upon the condition that it should be refunded by the town if the decision of the present case should authorize its being drawn out of the treasury. All parties, therefore, have acted at their peril, with full and timely notice that the proceedings of the town in appropriating the money were to be drawn in question before the proper tribunal. This presents a suitable case for the interposition of the court under

the powers granted by the statute, and a perpetual injunction must issue to restrain and prohibit any expenditure of money, or pledge of the credit of the town, under the vote of October 17, 1851."

In Iowa, the same doctrine has been asserted in the case of *Lamb v. Burlington etc. R'y Co.*, 39 Iowa, 333, which was an action brought by a tax-payer to enjoin the railroad company from receiving the fruits of its subscription, on the ground of irregularities which vitiated the contract. The court uses the following language: "There is still a further ground upon which the action of the district court may be sustained and affirmed. It is this: The tax was voted in January, 1872; the work of constructing the railroad on the faith of the tax was completed within a year; the plaintiff remained silent until all the benefits which would accrue to him were secured, and then, fourteen months after the vote, he seeks to enjoin the collection of the tax, and thereby relieve himself from the payment of that upon the faith of which he knew the work was being done. These facts work an equitable estoppel, as we have before held."

And the case of *Burlington etc. R'y Co. v. Stewart*, 39 Iowa, 267, was a case in which the same proposition was determined against a tax-payer, who alleged that the notices for the election were wholly insufficient, it being a suit between the railroad company and the tax-payer.

In Connecticut, the same doctrine is recognized and followed in a very strong opinion in a case between a municipality and a railroad company, being the case of *New Haven etc. R. R. Co. v. Town of Chatham*, 42 Conn. 465. The court uses the following language: "The town of Chatham, for the purpose of aiding in the completion of a railroad that was in the course of construction through the town, and which was in an embarrassed condition, passed a vote, under authority of the legislature, to guarantee not exceeding forty thousand dollars of certain bonds which the railroad company was authorized to issue, such guaranty to be made after the road was completed. The resolution authorizing this action of the town provided that the votes should be by ballot, and the warning of the town meeting, which was recorded upon the records of the town, stated that the vote would be so taken, that ballot-boxes would be open for the purpose, and that those in favor of the proposition would deposit ballots with 'Yes' upon them, and those opposed, ballots with 'No' upon

them. The record of the meeting, by the town clerk, was, that 'resolution was adopted; yes, 178; no, 86.' The vote was in fact taken by a division of the house, and not by ballot; but neither the officers of the town nor any person in its behalf ever claimed or gave notice that it was not taken by ballot until more than three years after, and until long after the railroad had in good faith, and with knowledge of all the inhabitants of the town, issued the bonds which were to be guaranteed, and delivered them to contractors, who had performed work, furnished materials, and expended money in reliance upon them, the contractors taking them with an order upon the town for its guaranty of them when the work was completed. Held, that the town was a municipal corporation, and the inhabitants of the town were estopped from claiming that the vote was not legally taken; and held, that the town was estopped from availing itself of a correction of the record of the town clerk, afterward made under an order of the superior court, upon the application of one of the tax-payers of the town, showing that the vote was taken by a division of the house, and not by ballot. It appeared that when the vote was taken the treasurer and managing director of the railroad company was present, and saw how it was done; but that he was not acting officially, and that his knowledge was not conveyed to any of the other directors of the company. Held, that the railroad company was not affected by his knowledge."

While there are other authorities that have been either cited at the bar or examined by the court on this question, we have given a sufficient number of what we regard as the most important cases to authorize us to say that the overpowering weight of modern judicial opinion is to the effect that, assuming the illegality of the petition, the other acts of the municipality, and its silence and non-action, as heretofore recited, are amply sufficient to estop it from asserting that illegality in this action. The other acts of the municipality referred to are as different as the reported cases, but those acts most common to all the cases are the reception and use of the benefits of the contract, the enjoyment of the labor of others, failure to protest or to commence legal proceedings in apt time, the retention of the stock, and general acquiescence in all proceedings until the contract becomes wholly executed. In this case, it is almost safe to aver that every element of silence, acquiescence, enjoyment of the labor of others, neglect to protest or litigate, recognition, ratification, retention of

stock, and all other acts that call for the application of the principle of estoppel, have been established as indisputable facts by this record, and have such controlling force that we are compelled to recommend the issuance of the peremptory writ.

The COURT. It is so ordered.

RAILROAD-AID BONDS. — Purchasers of municipal bonds issued in aid of railroads are bound to take notice of the law under which they were issued: *Diamond v. Lawrence Co.*, 37 Pa. St. 353; 78 Am. Dec. 429; *Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413. Such bonds, if issued without authority of law, are void, no matter into whose hands they may come: *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442; *People v. Hamill*, 134 Ill. 666. But a *bona fide* purchaser who takes them in reliance upon an official certificate which they contain of the facts authorizing them to be issued, is entitled to recover on them, notwithstanding matters of defense which the municipality might raise against the company: *Bank of Rome v. Rome*, 19 N. Y. 20; 75 Am. Dec. 272. When the county record shows enough upon matter of authority for issuance to justify a purchaser in taking county bonds, he cannot be required to go behind it, and show that the record is true: *Clapp v. Cedar County*, 5 Iowa, 15; 68 Am. Dec. 678. But bonds issued by a county are absolutely void, when the election at which their issuance is authorized is ordered by the county court instead of the board of supervisors, upon whom the statute has conferred that power exclusively. All holders are deemed to have notice of the statute under which the bonds purport to be issued, and have access to the proceedings of the board of supervisors, which are public records. Nor will the fact that a majority of the legal voters of the county voted at the election in favor of the issuance of the bonds give them validity, since, the election being illegally called, the vote failed to confer the power: *Supervisors v. Cook*, 38 Ill. 44; 87 Am. Dec. 282.

ESTOPPEL OF TAX-PAYER OF MUNICIPALITY TO OBJECT TO ASSESSMENTS FOR IMPROVEMENTS. — *Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143, which is cited several times by the court in the principal case, was followed in *Bidwell v. Pittsburgh*, 85 Pa. St. 412, 27 Am. Rep. 662, and *Cross v. City of Kansas*, 90 Mo. 13, 59 Am. Rep. 1, but denied in *Petition of Sharp*, 56 N. Y. 257, 15 Am. Rep. 415, on the ground that the signer of the petition had a right to rely upon the performance of the duty by the board to which the petition was presented, that duty being to ascertain whether a sufficient number had signed to confer jurisdiction. This last case was declared, in *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438, to be a correct statement of the law. But an examination of *Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143, will show that it is by no means an authority for the proposition that the mere act of signing the petition is enough to estop the signer from afterwards objecting to the validity of the assessment. The petition in that case had been signed by the forty tax-payers, and presented as the expression of their collective wish, and when the city solicitor had pointed out that the requisite number had not signed, the defendant had taken away the document and procured additional, though not sufficient, signatures. Such conduct may well be deemed to impose a very different liability from that which is created by affixing a single signature without consulting any of the

other tax-payers. The latter act is rather of the nature of a provisional request, which may, when followed by a certain course of conduct, furnish the basis of a binding agreement, but which, apart from such conduct, cannot be regarded as containing the elements of an estoppel. As regards the effect of the simple act of signing the petition, therefore, the conflict of the authorities is, we think, more apparent than real. No case apparently goes the length of deciding that such an act is, without more, sufficient to raise an estoppel against the signer. In *Tone v. Columbus*, 48 Am. Rep. 446, will be found a comprehensive and reasonable statement of the circumstances which will constitute an estoppel.

BADGER LUMBER COMPANY v. MARION WATER SUPPLY, ELECTRIC LIGHT, AND POWER COMPANY.

[48 KANSAS, 182.]

AN APPURTENANCE IS A THING BELONGING TO ANOTHER THING AS PRINCIPAL, and passing as an incident thereto. Therefore, poles planted in the streets of a city, necessary to transmit electricity from a power-house, are appurtenant thereto.

MECHANIC'S LIEN, FOR WHAT APPURTENANCES MAY BE ENFORCED, — Poles planted in the public streets by an electric-light corporation, and connected with its electric-light plant, machinery, and power-house situate upon its real estate, are appurtenant to such plant and realty, and entitle the person who supplied them to a lien thereon, under a statute granting a lien to any person furnishing materials for erecting, altering, or repairing any building, or an appurtenance of any building, upon the whole piece or tract of land, the building, and appurtenances.

MECHANIC'S LIEN. — THE FACT THAT PROPERTY IS UPON OR WITHIN A PUBLIC STREET does not prevent a mechanic's lien from attaching in favor of a contractor who furnished it, if it is rightfully there under a franchise granted by the municipal authorities.

Keller and Dean, for the plaintiff in error.

King and Kelley, and Winslow, McDuffie, and Neal, for the defendant in error.

JOHNSTON, J. The Badger Lumber Company brought this action to recover \$227.50, the value of seventy cedar poles sold by the lumber company to the Marion Water Supply, Electric Light, and Power Company, which was used to support electric-light wires and lamps, and were connected with the plant and property of the defendant; and the plaintiff asked to have the defendant's property and its appurtenances charged with a lien for the same. The cause was submitted to the court without a jury, upon the following agreed facts: "It is agreed that the defendant has erected a system of water-works and electric-light plant, and machinery necessary to operate the

same, on the real estate described in plaintiff's petition, and has put in the proper machinery for furnishing electric light for the city of Marion, and has a franchise from the city to use the streets of the city for the erecting of poles and stretching electric-light wires thereon through the city, and that the defendant erected its poles and stretched its electric wires on the same over different portions of the city; that the plaintiff furnished poles for stretching the wires for the electric light, and that the defendant used the same in the streets of Marion, and stretched its electric wires upon the same, and hung its lamps thereon, and operated and used the same for the purpose of furnishing electric light for different portions of the city; that none of the material furnished by the plaintiff was actually placed upon the grounds mentioned in plaintiff's petition, but that the poles so furnished were all used in the streets of the city of Marion, and were connected with the electric-light machinery and water-works on defendant's premises by electric-light wires used by the defendant for the transmission of electricity from its premises through the city; that the machinery of the electric light and water-works is all located on the same premises, in the same building, and run by the same engine, but the dynamo for generating electricity, and its machinery, is so constructed and arranged that it can be used separate and apart from the water-works machinery, and that either the water-works or the electric-light plant can be operated separately and independently from each other; and have a franchise from the city to lay mains and pipes in the streets of the city, and are operating said system of water-works, and furnishing the inhabitants of said city with water by means of said system of water-works."

The court awarded plaintiff a personal judgment against the defendant for the amount claimed, but refused to enforce a lien upon the real estate and appurtenances of the defendant, for the reason "that no part of the material for which plaintiff claims a lien was on the real estate of the defendant, or attached thereto in any manner, except by the wires stretched from the poles of the defendant's electric-light machinery situated on said real estate."

The sole question presented here is, Do the poles and wires attached to the building and premises of the defendant constitute an appurtenance of the same within the meaning of the mechanics' lien law? The statute as it existed prior to 1889, when this cause of action arose, provided that "any

mechanic or other person who shall, under contract with the owner of any tract or piece of land, . . . perform labor, or furnish material for erecting, altering, or repairing any building, or the appurtenance of any building, or any erection or improvement, or shall furnish or perform labor in the putting up of any fixture in or attachment to any such building or improvement, . . . or shall build a stone fence, or shall perform labor or furnish material for erecting, altering, or repairing any fence, on any tract or piece of land, shall have a lien upon the whole piece or tract of land, the building, and appurtenances, in the manner herein provided," etc.

As will be seen, the statute gives a lien for material furnished for a building or its appurtenances, and the same is chargeable upon the land, building, and appurtenances. If the poles and wires can be regarded as an appurtenance of the power-house, the plaintiff acquired a lien, and is entitled to enforce it against the property of the defendant. What, then, is an appurtenance? Bquvier's definition is: "Things belonging to another thing as principal, and which pass as incident to the principal thing. . . . Thus if a house and lot be conveyed, everything passes which is necessary to the full enjoyment thereof, and which is in use as incident or appurtenant thereto."

"The grant of a thing will include whatever the grantor had power to convey which is reasonably necessary to the enjoyment of the thing granted. Thus the grant of a house with appurtenances passes a conduit by which water is conducted to it": 3 Washburn on Real Property, 3d ed., 719; *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Meek v. Breckenridge*, 29 Ohio St. 642; 1 Am. & Eng. Ency. of Law, 641.

Here the principal thing was the power-house; and the poles and wires attached thereto were an incident to the power-house and machinery. They were necessary to the enjoyment of the principal thing, and indispensable in the transmission of electricity and the lighting of the city. If a conveyance of the property of the company, with the appurtenances belonging, had been made by the defendant, we do not doubt that the poles and wires would have passed as appurtenant to the premises conveyed. The fact that the poles were planted in the streets of the city, the fee of which is in the public, will not change their character, or make them any the less an appurtenant to the premises of the electric-light company. The city had granted the company a franchise to

plant the poles upon the streets, and hence they were rightfully there, and there can be no question that they were owned by the electric-light company. In *Redlon v. Barker*, 4 Kan. 445, 96 Am. Dec. 180, it was held that a hotel sign, attached to a post planted in the street of a city, seven or eight feet from the front of the hotel, and placed there as a permanent sign, was an appurtenant to the hotel; and where the hotel and premises were conveyed, with the appurtenances, without reservation, such conveyance carried the sign and post. It was there urged that as the owner of the hotel did not have the fee of the street on which the post and sign were standing, they could not be regarded as appurtenances to the premises. But it was said, as the sign and post were rightfully in the street, and necessary for the uses and purposes of the building to which they were incident, they remained the property of the owner of the hotel, and when he conveyed the hotel premises, he parted with his title to the sign and post. In *Beatty v. Parker*, 141 Mass. 523, the plaintiff undertook to enforce a mechanic's lien for a drain-pipe from the cellar of a house, through the cellar wall, front yard, and out into the street to a connection with the sewer. The house was built upon a street of the city, and the piping inside of the house and outside of it to the sewer was necessary to the use of the house, and was included in the contract for building it. It extended twenty-seven feet beyond the street line, and the fee of the street was not in the owner of the house. The court ruled that the contractor was entitled to a lien for the piping, and stated that it is immaterial whether it was inside or outside the walls of the house, or whether it was above-ground or underground, or whether it extended one foot or thirty feet. It is immaterial, also, whether the fee of the land in the street was or was not in the owner of the lot. It must be assumed that the pipe was rightfully laid to the sewer, even if the fee of the street was not in the respondent. The pipe did not become the property of the owner of the fee of the street, but belonged to the owner of the house, and he had an interest in the soil of the street to sustain his pipe, which would pass by a deed of the lot. See also *Philbrick v. Ewing*, 97 Mass. 134; *New Ipswich Factory v. Batchelder*, 3 N. H. 190; 14 Am. Dec. 346; *Carpenter v. Leonard*, 5 Minn. 155; *Williamette etc. Milling Co. v. Remick*, 1 Or. 169; *Pullis v. Hoffman*, 28 Mo. App. 666; *McDermott v. Palmer*, 8 N. Y. 387; *Amis v.*

Louisa, 9 Mo. 621; Phillips on Mechanics' Liens, sec. 202; Kneeland on Mechanics' Liens, sec. 88.

The defendant in error principally relies upon *Parmeles v. Hambleton*, 19 Ill. 615, to defeat the lien and sustain the judgment that was rendered. The court there held that a person who performed labor upon a vault under a sidewalk adjacent to a building was not entitled to a lien. The vault is there held to be an appurtenance to the building, but as the appurtenance was in the street, and not upon the lot on which the building stood, the lien was denied. The case is not an authority here, and is based upon an Illinois statute which provided that both the building and appurtenance shall be upon the lot sought to be subjected to the lien. Our statute does not require that the appurtenance shall be upon the land, but authorizes a lien where the structure or improvement is appurtenant to the land or building. While the lien rests upon a statute, and the remedy must be confined within the terms of the statute, yet such provisions are to receive a liberal construction, in the interest of justice; and we think the term "appurtenances," as used in the statute, fairly includes the poles and wire attached to the premises of the defendant, and that the plaintiff is entitled to the lien which it claimed.

The judgment of the district court will be reversed, and the cause remanded, with instructions to enter judgment in favor of the plaintiff.

APPURTENANCES, WHAT ARE: See *Wilcox v. McGhee*, 12 Ill. 381; 54 Am. Dec. 409; *Frey v. Drahos*, 6 Neb. 1; 29 Am. Rep. 353; *Bonelli v. Blakemore*, 66 Miss. 136; 14 Am. St. Rep. 550.

MECHANIC'S LIEN, WHAT SUBJECT TO. — As to what parts of a building come within law of mechanic's lien, see note to *Paulsen v. Manske*, 9 Am. St. Rep. 538, and note to *Harrison v. Homœopathic Ass'n*, 19 Am. St. Rep. 714. Buildings and structures, generally, against which the lien may be enforced: See note *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 694-699. The lien of a mechanic includes not only the buildings on which his work was done, and the land on which they stand, but also the land about the buildings, used with them, and necessarily or reasonably convenient to their use: *Bank of Charleston v. Curtiss*, 18 Conn. 342; 46 Am. Dec. 325. Under the mechanic's lien law of Washington, there can be no lien obtained on personal property not attached to a building so as to become part of it: *Vendome etc. Bath Co. v. Schettler*, 2 Wash. 457. Poles planted in the ground, connected together by means of wire and insulators, for the purpose of transmitting electricity for light and power, and other purposes, constitute a "structure," within the meaning of section 3669 of Hill's Oregon Code: *Forbes v. Willamette Falls Electric Co.*, 19 Or. 61; 20 Am. St. Rep. 793.

BADGER LUMBER COMPANY v. MARION WATER SUPPLY, ELECTRIC LIGHT, AND POWER COMPANY.

[48 KANSAS, 187.]

MECHANICS' LIENS CANNOT, AS A GENERAL RULE, BE ENFORCED AGAINST PROPERTY NOT SUBJECT TO SALE UNDER EXECUTION; but if property belongs to a corporation having power by its voluntary act to create a lien thereon, whereby it may be subjected to seizure and sale, it may also be subject to a mechanic's lien.

MECHANICS' LIENS AGAINST PROPERTY OF QUASI PUBLIC CORPORATIONS. —

The property of an electric-light corporation, having a franchise from a city to occupy its streets in the transmission of light to its inhabitants, is subject to a mechanic's lien under a statute granting such lien to any mechanic or other person who shall, under contract with the owner of any tract of land, perform labor or furnish material for erecting, altering, or repairing any building or appurtenance to any building, or any erection or improvement.

King and Kelley, and Winslow, McDuffie, and Neal, for the motion.

Keller and Dean, contra.

JOHNSTON, J. On the first consideration of this case, it was decided that the poles and wires attached to an electric-light plant and premises were appurtenances of the same, within the meaning of the mechanic's lien statute, and that persons who furnished labor or material for such appurtenances were entitled to a lien on the whole. Our attention is now called to another question, which was not considered, but which is fairly in the record, viz.: Is the property of an electric-light company having a franchise from the city to occupy its streets in the transmission of light to the inhabitants of a city subject to a mechanic's lien?

It is contended that this corporation, like a railroad company, is an instrumentality of the public, authorized and established for the convenience and benefit of the public, and that, on the grounds of public policy and necessity, its operation should not be disturbed or its property subjected to a lien at the instance of a laborer or material-man who has contributed to the building of its plant. If it were conceded that the railroad company and the electric-light company are to be placed in the same class of corporations, we would still think that there was no public policy nor necessity which required an exemption of their property from liability to the ordinary process of law or to a mechanic's lien.

The general rule is, that the public property of a municipal corporation is not subject to seizure and sale; and it is generally held that a mechanic's lien cannot be enforced against property which is not subject to sale on execution. The reason for this exemption is, that such corporations are instrumentalities of the government itself, and the seizure and sale of the public property would interrupt and suspend the functions of government, and also that other provisions have been made by law for the collection and payment of public obligations. Corporations, however, such as the one claiming exemption here, although they serve the public convenience to some extent, are not organized merely for public advantage, but are operated largely for the private benefit of the incorporators. In this state, such corporations may mortgage or sell their property; and the general rule is, that property of a corporation which may be sold under a mortgage or specific lien given by the owner may be subjected to a mechanic's lien. If a corporation may, by its voluntary act in creating a specific lien, subject its property to seizure and sale, it is difficult to find any substantial objection to allowing and enforcing the claim of a laborer or material-man against the same property under the mechanic's lien law.

In some of the states, notably Pennsylvania (*Foster v. Fowler*, 60 Pa. St. 27; *Guest v. Merion Water Co.*, 142 Pa. St. 610; see also *Graham v. Mt. Sterling Coal Road Co.*, 14 Bush, 425; 29 Am. Rep. 412), it has been held, under their statutes, that a mechanic's lien will not attach to the property of quasi public corporations. But our statute does not, in terms or by implication, warrant any such exemption. The language of the statute is broad and comprehensive, and contains no suggestion of any exemption such as is claimed here. Under the terms of this statute, it has been held that a lien may be secured on a public school-house erected by a school district: *Wilson v. School District*, 17 Kan. 104; *School District v. Conrad*, 17 Kan. 522. Although some of the authorities hold in favor of the exemption, because a judicial sale or the enforcement of a mechanic's lien would impair the usefulness of such corporations, and occasion public inconvenience, yet it has been well said that "the evil of withdrawing a vast and constantly increasing amount of the wealth of the country from the reach of creditors has been regarded as so real and serious that the courts have not given it their countenance or support; and at the present day the property of corporations other than muni-

cipal, though essential to the enjoyment of the corporate franchises, is most universally treated as subject to execution". 1 Freeman on Executions, sec. 126. See also *Hill v. La Crosse etc. R. R. Co.*, 11 Wis. 214; *Boston etc. R. R. Co. v. Gilmore*, 37 N. H. 410; 72 Am. Dec. 336; *Platt v. New York etc. R. R. Co.*, 26 Conn. 544; *Coe v. Peacock*, 14 Ohio St. 187; *Lathrop v. Middleton*, 23 Cal. 257; 83 Am. Dec. 112; *State v. Rives*, 5 Ired. 307; *Board of Education v. Greenebaum*, 39 Ill. 609; *Arthur v. Commercial etc. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *Girard Point Storage Co. v. Southwark F. Co.*, 105 Pa. St. 248; Phillips on Mechanics' Liens, sec. 182.

The rehearing will be denied.

MECHANIC'S LIEN, WHAT PROPERTY SUBJECT TO: See note to *Badger Lumber Co. v. Marion Water etc. Co.*, ante, p. 300. Unless expressly authorized by statute, a mechanic's lien cannot be enforced against real estate belonging to a municipal corporation and in public use: *Leonard v. Brooklyn*, 71 N. Y. 498; 27 Am. Rep. 80. On the other hand, it was held in *McKnight v. Parish of Grant*, 30 La. Ann. 361, 31 Am. Rep. 226, that although land donated and devoted to public uses cannot be subjected to debts of the municipality, yet a public building thereon, as a jail, is subject to a mechanic's lien in favor of one who built it for the municipality. A school-house erected by a public school district is not subject to seizure under the general mechanic's lien law, when the constitution prohibits every school district from incurring indebtedness exceeding the annual revenue provided for it, unless before the indebtedness is incurred provision shall be made for its payment by taxation: *Mayrhofer v. Board of Education*, 89 Cal. 110; 23 Am. St. Rep. 451.

CITY OF OLATHE v. MIZER.

[48 KANSAS, 435.]

A MUNICIPAL CORPORATION LEAVING UNGUARDED, in the night-time, and without danger-signals, an excavation extending upon or near to a cross-walk in a public street is guilty of gross carelessness.

NEGLIGENCE CONCURRENT AND CONTRIBUTORY. — If a woman, walking in the night-time on a cross-walk in a public street is caused to step to one side to avoid collision with persons approaching from the opposite direction, and is injured by falling into an unguarded excavation by the side of the walk, the municipality, through whose negligence the excavation was thus left unguarded, cannot avoid liability on the ground that the injury partly resulted from the negligence of the persons thus approaching, nor on the ground that the plaintiff was guilty of contributory negligence in stepping aside from the walk. The divergence from the cross-walk is not ordinarily evidence of want of care.

MUNICIPAL CORPORATIONS — STREETS, NEGLIGENCE IN USE OF. — A person desiring to cross a street is not confined to the crossing, but may assume that all parts of the street which are intended for travel are reasonably safe. He may therefore cross at any point without being liable to the imputation of negligence, if he has no notice of any dangerous excavation or obstruction.

S. T. Seaton, for the plaintiff in error.

John T. Little, for the defendant in error.

JOHNSTON, J. This action was brought by Elvira Mizee against the city of Olathe, to recover for personal injuries sustained by her in falling into an excavation in a public street of the city of Olathe, which was left uncovered and unguarded. She was injured in the night-time, while crossing Kansas Avenue at its intersection with Park Street, and while passing along on the south side of Park Street. An excavation was made by the city, under the direction of the street commissioner, about twenty inches deep and twenty inches wide, for the purpose of laying a drain-pipe to carry off water along the east side of Kansas Avenue. It extended from the cross-walk on the south side of Park Street southward. The cross-walk was constructed of two rows of stone, each of which was twenty inches wide, with an intervening space between them of twenty inches. The ditch, which extended up to this cross-walk, was left unguarded; and the plaintiff, in attempting to pass along the cross-walk, met parties going in an opposite direction, and stepping aside to allow them to pass, she fell into the ditch and sustained the injuries complained of. The jury awarded her eight hundred dollars, and the city complains, and assigns several rulings of the court as error.

An exception was taken to the admission of testimony in regard to the placing of a light at the ditch by the city marshal subsequent to the occurrence of the injury. It was contended that it was offered to show negligence on the part of the city, and an admission that such a precaution should have been taken prior to the accident. On the other side, it was said that it was not offered for that purpose, but that as one witness had incidentally remarked that there was a light there, the testimony was introduced merely to show that it was not there when the injury occurred, and to prevent the inference that Mrs. Mizee, by the aid of such light, should have seen and avoided the excavation. Whatever may have been the purpose of the parties in respect to this testimony, it is unim-

portant in this case, and the objection made is immaterial. The negligence of the city in the matter is undoubted. To leave such a dangerous excavation in a public thoroughfare of the city, and close to a much-used walk, without guards, barriers, lights, or danger-signals, is a marked case of carelessness. It would be clearly negligence to leave such a ditch uncovered and unguarded in the daytime; but for the city authorities to permit such a pitfall to remain open and without lights or guards in the night-time, with full knowledge of its dangerous character, is gross carelessness. There is no dispute as to the existence, location, and character of the excavation; and hence the ruling of the court upon the admission of testimony respecting the negligence of the city is unimportant. If the question of negligence on the part of the city had been in issue, the court would have been justified in admitting the testimony: *St. Joseph etc. R. R. Co. v. Chase*, 11 Kan. 47; *Atchison etc. R. R. Co. v. Retford*, 18 Kan. 245; *City of Emporia v. Schmidling*, 33 Kan. 485; *St. Louis etc. R'y Co. v. Weaver*, 35 Kan. 412; 57 Am. Rep. 176; *City of Abilene v. Hendricks*, 36 Kan. 196; *Atchison etc. R. R. Co. v. McKee*, 37 Kan. 592.

Complaint is made of the refusal of an instruction requested by the city, that if it was found from the evidence "that the injury complained of was caused by the negligence of the city, combined with the negligence of a third party, for whose acts the city was not responsible, and would not have happened but for the acts of such third party, then the city is not liable, and you must find for the defendant." The request was based upon testimony to the effect that Mrs. Mizee stepped from the cross-walk to avoid a collision with persons who were approaching her on the walk from the opposite direction. The testimony in the case is not such, in our opinion, as to require a statement of the rule with reference to the proximate and remote causes of the injury. It is not of such a character that it can be said that the injury would not have occurred but for the negligence of the persons who met and passed her upon the street. There is nothing to indicate any negligence on their part. They did not jostle or push her. She was carrying large bundles in her arms, and as they did not appear to see her in the darkness as they approached, she stepped aside, in order to allow them to pass. If they had seen her, and stepped aside, it is quite probable that they would have suffered the same misfortune which befell her. Even if the testimony warranted an instruction upon the subject of con-

curing negligence, the one requested by the city does not correctly state the law: *Village of Carlerville v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248; *Webster v. Hudson Riv. R. R. Co.*, 38 N. Y. 260; *Ring v. City of Cohoes*, 77 N. Y. 88; *North Penn. R. R. Co. v. Mahoney*, 57 Pa. St. 187; *Burrell v. Uncapher*, 117 Pa. St. 353; 2 Am. St. Rep. 664; *Smith v. New York etc. R. R. Co.*, 46 N. J. L. 7; *Winship v. Enfield*, 42 N. H. 197; *Cleveland etc. R. R. Co. v. Terry*, 8 Ohio St. 570; *Hunt v. Pownal*, 9 Vt. 411; *Taylor v. City of Yonkers*, 105 N. Y. 202; 59 Am. Rep. 492; Patterson on Railway Accidents, secs. 39, 95; Shearman and Redfield on Negligence, secs. 36, 346.

The proximate cause of the injury was the negligence of the city. It was its duty to keep, not only the cross-walks, but the entire width of the street in a reasonably safe condition for both pedestrians and teams. It was one of the principal thoroughfares of the city, and in the absence of any guards, lights, or notices of danger, Mrs. Mizee had a right to presume that all parts of it could be traveled with safety. A divergence or departure from the cross-walks is ordinarily not an evidence of want of care. Pedestrians have a right to cross a street at any point, and it is the common practice to do so. A difference in this respect exists between sidewalks and cross-walks, as the former are for pedestrians only, while the latter are placed on a level with the street, and are traveled over by both foot-passengers and vehicles. The cross-walk in question was narrow, consisting of two rows of stones; but the plaintiff was not restricted to picking her way across the street on these stones; and if she had crossed at another point where the open ditch was met, and, without negligence on her part, had fallen therein, she might have recovered for her injuries.

"A person desiring to cross the street, either in the night-time or in the daytime, is not confined to a crossing. He has a right to assume that all parts of the street intended for travel are reasonably safe; and if in the night-time he desires to cross from one side to the other, and knows of no dangerous excavations in the street, or other obstructions, he may cross at any point that suits his convenience, without being liable to the imputation of negligence": *Brusso v. City of Buffalo*, 90 N. Y. 679; also *Raymond v. City of Lowell*, 6 Cush. 524; 53 Am. Dec. 57.

The city assigns as error the refusal of the court to require more specific answers to several questions. One of them was: "Could the plaintiff have remained upon the cross-walk by

the use of ordinary care?" Another was: "Would she have been injured if she had passed to the right of the walk?" In response to these questions, the jury answered: "No evidence." From what has been said it will be readily seen that there is no materiality in either of the questions.

Some other objections are made, but they are not of sufficient importance to require consideration or comment.

We think the case was fairly tried, and that a just result was reached. Judgment affirmed.

MUNICIPAL CORPORATIONS — LIABILITY FOR LEAVING EXCAVATIONS UNGUARDED. — Municipal corporation is liable to person injured by falling into an excavation in a street, negligently left unguarded by persons so employed: *Lloyd v. Mayor*, 5 N. Y. 369; 55 Am. Dec. 347; *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485. But it is sufficient, as a general rule, to show that proper signals or secure guards were placed about an excavation on quitting work, and no liability attaches if a wrong-doer removes the signals during the night: *Dooley v. Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209. Municipal corporation is also liable to a person who, without fault, falls into an excavation made in a public street by a contractor with the city, who has neglected to provide proper guards and lights for the protection of persons passing the place: *Storrs v. Utica*, 17 N. Y. 104; 72 Am. Dec. 437; *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *Detroit v. Corey*, 9 Mich. 165; 80 Am. Dec. 78; *Wilson v. Wheeling*, 19 W. Va. 323; 42 Am. Rep. 780; *Buffalo v. Holloway*, 7 N. Y. 493; 57 Am. Dec. 550; *Pettengill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442. *Contra*, see *James v. San Francisco*, 6 Cal. 528; 65 Am. Dec. 526; *Erie v. Caulkins*, 85 Pa. St. 247; 27 Am. Rep. 642. A city is not required to put up danger-signals along an excavated street, as to one traveling outside thereof, except at the crossings or intersections of such street by other public streets or highways: *Mulvane v. South Topeka*, 45 Kan. 45; 23 Am. St. Rep. 706.

CONCURRENT NEGLIGENCE. — For a full discussion of this subject, see note to *Village of Carterville v. Cook*, 16 Am. St. Rep. 250-257. Later cases are *Gulf etc. R'y Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755; *Consolidated etc. Co. v. Keifer*, 134 Ill. 481; 23 Am. St. Rep. 688; *Electric R'y Co. v. Shelton*, 89 Tenn. 423; 24 Am. St. Rep. 614.

MUNICIPAL CORPORATIONS — RIGHTS OF FOOT-PASSENGERS IN STREETS. — A foot-passenger has a right to cross a street at any point, and is not restricted to the regular crossings: *Raymond v. City of Lowell*, 6 Cush. 524; 53 Am. Dec. 57; *Moebus v. Hermann*, 108 N. Y. 349; 2 Am. St. Rep. 440.

GERMAN INSURANCE COMPANY v. YORK.

[48 KANSAS, 488.]

INSURANCE — NOTICE OF SALE AND MORTGAGE. — Notice of the sale of the property insured, and the assent of the insurer thereto, together with notice to the local agent of a mortgage taken to secure the payment of a portion of the purchase price, is sufficient to operate as an assent on the part of the insurer to the giving of the mortgage, though the policy of insurance contains a provision that if the property shall be thereafter mortgaged without the consent of the company being indorsed thereon, it shall become null and void, and that no agent shall have power to alter or change the terms of the policy, or make any indorsement thereon.

INSURANCE. — CONVEYANCE OF HOMESTEAD MADE BY A HUSBAND ALONE, and which is therefore void, cannot affect a policy of insurance.

INSURANCE, ENTIRETY OF. — If insurance is effected upon real and personal property by a policy showing the amount for which each is insured, and that the premium is a gross sum, the contract is divisible, and the mortgaging of the personal property without the consent of the insurer cannot avoid the policy as to the real estate.

G. W. Barnett, John W. Sheafor, and Charles L. Botsford, for the plaintiff in error.

Kennett, Peck, and Matson, for the defendant in error.

GREEN, C. This was an action brought by C. W. York, in the district court of Cloud County, upon a policy of insurance against fire, issued by the German Insurance Company, for one thousand dollars, eight hundred dollars being upon a dwelling-house and two hundred dollars upon the contents. The policy was made to Clinton L. Mosher, dated the thirty-first day of May, 1886, and assigned to the defendant in error on the seventh day of May, 1887, he having purchased the premises upon which the house was situated on that date. A mortgage was executed by York and wife to Mosher to secure one thousand dollars of the purchase price. It appears from the pleadings and findings of fact that the assignment of the policy was assented to by the insurance company on the first day of June, 1887, and the proper indorsement was made on the policy. The insurance company claimed that it had no notice of the mortgage at the time of this indorsement. The court found, however, that the local agent of the insurance company had notice of the terms and conditions of the sale. The policy contained a condition that if the property should thereafter be mortgaged or encumbered without the consent of the company being indorsed thereon,

the policy should become null and void. The policy contained the further provision, that no agent or employee of the company, or other person, should have power or authority to alter or change the terms of the policy, or make any indorsement thereon. On the twenty-fourth day of September, 1887, C. W. York executed a deed to Kohler, Marvin, and Saddler, for the premises covered by the policy, but his wife did not sign the deed with him, although it was their homestead at the time. On the eighth day of December of the same year, the plaintiff below made a chattel mortgage to the same parties upon all of the personal property described in the insurance policy, to secure the payment of fifteen hundred dollars. The property was destroyed by fire on the ninth day of March, 1888. Proof of loss was sent to the company on the first day of May, 1888, and on the fourteenth day of May the adjusting agent of the company acknowledged the receipt of the proof of loss, but demanded more specific and fuller details of the loss. On the 19th of the same month, in answer to a letter from the attorneys of the plaintiff, who desired to know if the company proposed to pay the loss, the adjusting agent wrote that the question was premature, for the reason that the insured had not as yet made proof in accordance with the policy. The plaintiff afterward prepared another proof of loss, which was transmitted to the company; and on the second day of June the adjusting agent wrote the plaintiff that the proof was not such as had been requested, and demanded a strict compliance with all of the conditions of the policy. At the April term, 1889, the case was tried by the court and special findings of fact made, and judgment was rendered against the company for the amount of the policy and interest. A motion for a new trial was made and overruled. The company brings the case here for the review of assigned errors.

The first contention of plaintiff in error is, that the policy of insurance is void by reason of the mortgage executed by York to Mosher, without the consent of the company. This mortgage was given as part of the purchase price of the premises upon which the insured property was situated. The company assented to the sale and transfer of the policy to York. We fail to see how the risk was in any way increased. York paid five thousand dollars in cash for the farm, and gave a mortgage for one thousand dollars for the balance of the purchase price to Mosher. It was all one transaction. The company had notice of the sale; and this, we think, included

all that took place concerning the transfer of the title from Mosher to York. In the case of *Farmers' Ins. Co. v. Ashton*, 31 Ohio St. 477, it was held that the consent given by the company to a sale and transfer of title was an assent to the terms upon which the same were made, and hence that the execution of the mortgage did not avoid the policy. In addition to this, the court found that the local agent was informed by York of the terms of the purchase of the insured property, and that York had given Mosher a mortgage for one thousand dollars on the land. We think the consent to the transfer of the policy, coupled with the fact that the local agent was advised of the sale and the execution of the mortgage, were sufficient to operate as an assent upon the part of the company to the giving of the mortgage.

It is next claimed that the deed given by York to Kohler, Marvin, and Saddler violated the policy. A sufficient answer to this contention is, that the deed purported to convey the homestead, and it was signed by the husband alone, and was therefore void. When we say an instrument is void, we mean that it has no force and effect. A void deed could not therefore affect the policy of insurance. No title passed by the void instrument; so the land still remained the property of York.

The further claim is made, that a policy of insurance must be considered as an entirety, and that the mortgaging of any part of the property, either personal or real, avoids the entire policy. The trial court found that York executed a chattel mortgage to Kohler, Marvin, and Saddler on all of the personal property described in the insurance policy, after the assignment of the policy to him. If plaintiff in error be correct in its contention, this would avoid the policy, because there is nothing to show that the company consented to the giving of this mortgage. While the policy sued upon in this case shows that the premium was a gross sum, the insured estate consisted of real and personal property, and there was a given amount of insurance upon each kind of property. Now, if there had been a total loss of one kind of property and the other had been saved, it is clear that the company would only be called upon to make good the loss of the property destroyed, and the liability of the company would be limited to that alone. To this extent we think it fair to say that the contract is divisible. Two kinds of property constituted the subject-matter of the contract, and the insurance company placed a fixed valuation upon each, for which it agreed to become

responsible in case of loss. In a well-considered case decided by the court of appeals of New York, Mr. Justice Folger said: "It is plain from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance, that they looked upon them as distinct matters of contract. The effect of the separate valuation was to make them so. No matter how much value there might have been in any one of those subjects, even to the whole amount of the policy, had it been totally destroyed, the defendants could not have been made liable to an amount greater than that named in the policy as the valuation of it. Thus it was, at the inception of the contract, distinguished from the other subjects of insurance, and the contract so made as to be capable of application to it alone. So, too, if but one of the subjects of insurance had been burned, the defendants (*ceteris paribus*) could not have avoided liability to pay for that, up to the value put upon it; and if not wholly destroyed, but so far damaged as to reach in deterioration the value put upon it in the policy, the defendants would have to pay that damage; and that subject would no longer form a part of the general matter insured, and hence not a part of the continuing contract. Thus there would of necessity be a severance of the contract, worked out by the operation of its own terms. Again, the principle in the case of a contract about several things, but with a single consideration in gross, is this: that we are not able to say that the party would have agreed for one, or for more than one, yet less than all of them, without he could at the same time acquire a right to have them all. But our daily experience and observation show that an insurance company is as ready to insure buildings without insuring the contents, and the contents without insuring the buildings, as to insure them together; so that that principle does not press so hard in considering such a contract as that before us. Besides, it is a rule that an agreement embracing several particulars, though made at one time and about one affair, may yet have the nature and operation of several different contracts; as when they admit of being separately executed and closed, as we have instanced just above, when the contract may be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed: *Perkins v. Hart*, 11 Wheat. 237, 251, per Washington, J.; *Rodemer v. Hazlehurst*, 9 Gill, 294. In our judgment, this rule applies fitly to the contract in hand. It admits of being separately

executed and closed as to each of the separate subjects of insurance. When one species of the property insured is burned, the contract to insure as to that may be performed as to that alone. The insured has paid the premium. A fire doing damage to that subject, that damage may be paid for by the insurer, and that subject be thus put out of the contract, while it remains *in fieri* as to all the other subjects named in it. When there are several subjects of insurance (as there are fourteen here), separately valid, on which a gross sum is insured, not exceeding the aggregate of that valuation, for the insurance of which a premium in gross is paid, it is easy to see what is the rate of premium on the whole valuation, and what is the amount of premium on each subject insured. This being so, it seems fanciful to say that if the facts thus easily reached were stated in detail in the contract, it would be severable, while not being specifically spread out, it is entire": *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; 29 Am. Rep. 184.

See also, as sustaining the doctrine that an insurance contract is divisible, and that a breach of the condition only affects the class of property which is the immediate subject of the act of encumbrance, *Schuster v. Dutchess Co. Ins. Co.*, 102 N. Y. 261; *Clark v. New England etc. Ins. Co.*, 6 Cush. 342; 53 Am. Dec. 44; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582; *Knight v. Eureka Ins. Co.*, 26 Ohio St. 664; 20 Am. Rep. 778; *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126; 97 Am. Dec. 325; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 248; *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696; *Phoenix Ins. Co. v. Grimes*, 33 Neb. 340.

We are aware of the fact that a number of states have held that a contract of insurance is not divisible; but we think, where a separate valuation is fixed upon the different kinds of property insured, the better rule is to hold that the contract is severable, and not entire and indivisible. It follows from this view of the law in this case that the policy of insurance upon the dwelling-house for eight hundred dollars should be held good. As to the personal property covered by the policy, we think the giving of the chattel mortgage avoided the policy upon the household furniture.

We deem it unnecessary to notice the other assignments of error, as they do not affect the substantial rights of the plaintiff in error.

It is recommended that the judgment of the district court be modified by striking out the two hundred dollars, and in-

terest computed thereon, for the amount of the policy upon the personal property, and that the costs of this court be divided equally between the parties.

The COURT. It is so ordered.

INSURANCE — CONDITION AGAINST TRANSFER OR ENCUMBRANCE — NOTICE OF, TO INSURER. — Where the insured, when applying for insurance, informs the insurer of the amount of encumbrances then existing upon the property, and the latter issues the policy with notice of such encumbrances, the condition against encumbrances is not violated, if their amount never exceeded the amount stated: *Gould v. Dwelling-house Ins. Co.*, 134 Pa. St. 570; 19 Am. St. Rep. 717. A condition against increase of encumbrances on the insured property without notice thereof to the company is not violated by a change but not an increase of encumbrances known to the company at the time the insurance was effected: *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 696, and note; see note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 247. Where a policy is conditioned to become void upon an alienation of the property, unless written notice is given to the directors, the fact that an agent had full knowledge of and assented to a subsequent alienation does not conclude the company: *Tarbell v. Vermont etc. Ins. Co.*, 63 Vt. 53. See also *Penn. Mut. etc. Ins. Co. v. Schmidt*, 119 Pa. St. 449.

INSURANCE. — ENTIRETY OF CONTRACT: See *Stevens v. Queen Ins. Co.*, 81 Wis. 335; 29 Am. St. Rep. 905, and note, in which the cases on this subject are collected, and the conflict of opinion thereon in the several states is discussed.

RICE v. MOORE.

[43 KANSAS, 300.]

STATUTE OF LIMITATIONS. — A DEMURRER will be sustained to a complaint if it appears therefrom that the alleged cause of action is barred.

STATUTE OF LIMITATIONS — JUDGMENTS. — IF AN ACTION IS BROUGHT IN ONE STATE upon a judgment rendered in another, the statute of limitations of the former state must control.

A SCIRE FACIAS to revive a judgment is not a new action, but the continuance of an old one.

STATUTE OF LIMITATIONS — JUDGMENTS. — THE REVIVOR OF A JUDGMENT in the state in which it was rendered, without personal service on the defendant or the entry of his appearance, cannot prevent the operation against such judgment of the statute of limitations of another state, in which the defendant resided at the time of such revivor, and in which an action is thereafter attempted to be maintained against him. The running of such statute must be computed from the original entry of the judgment, if, during all the time thereafter, the defendant was personally present within the state in which he is sued upon the judgment.

H. R. Boyd, for the plaintiffs in error.

Milton Brown, for the defendants in error.

HORTON, C. J. On the twenty-seventh day of October, 1879, Rice, Brown, & Co., a firm doing business in the state of Ohio, recovered a personal judgment against William Moore, in the county of Ottawa, in that state. There is an unpaid balance upon the judgment of \$249.30. The judgment became dormant under the statutes of Ohio; but at the January term for 1889 of the court of common pleas of Ottawa County, it was revived by publication. William Moore was not personally served with any notice that the judgment would be revived, nor did he enter any appearance in the proceedings of revivor. It is not alleged in the petition that the defendant William Moore is a non-resident of this state, or that he has ever been out of the state, or has absconded, or concealed himself. This action was commenced on the first day of May, 1889, nearly ten years after the rendition of the judgment in Ohio, and a few months after the revivor by publication, in January, 1889. A general demurrer was filed to the petition, which was sustained by the court below. Rice, Brown, & Co. complain of this ruling.

The question is, whether the petition is sufficient, in view of the five years' statute of limitations prescribed by our statute: Civ. Code, sec. 18; *Burnes v. Simpson*, 9 Kan. 658; *Mawhinney v. Doane*, 40 Kan. 676. Where it is apparent from the face of the petition that the debt or claim is barred, a demurrer is properly sustained: *Zane v. Zane*, 5 Kan. 134; *Stanclift v. Norton*, 11 Kan. 218. If there had been no revivor of the judgment in Ohio, we suppose it would be conceded, even if the judgment had not become dormant under the statutes of that state, that no recovery could be had upon the judgment in this state, if Mr. Moore had been an actual resident of this state for five years (the full time of our limitation) after the rendition of the judgment. The authorities are to the effect that "remedies are to be governed by the laws of the country where the suit is brought." The laws of this state, where the action is brought, must govern the limitation. It was recently decided by this court, in *Bauserman v. Charlott*, 46 Kan. 480, that "where an action is brought in this state upon a judgment of a court of record of a sister state, which is in full force in that state, the statute of limitations of this state, and not that of the sister state, will control": *United States v. Donnally*, 8 Pet. 372.

It is contended, however, as the judgment was revived in Ohio in January, 1889, a few months only before this action

was commenced, that the bar of the statute of limitations is not effective. A *scire facias* to revive a judgment is not a new suit, but the continuation of an old one: Freeman on Judgments, sec. 444; *Elsasser v. Haines*, 52 N. J. L. 10. In *Irwin v. Nixon*, 11 Pa. St. 425, 51 Am. Dec. 559, it is said to be "a common, plain, and familiar principle, that a *scire facias* to revive a judgment . . . is but a continuation of the original action, and the execution thereon is an execution on the former judgment. The judgment on the *scire facias* is not . . . a new judgment, giving vitality only from that time, but it is the revival of the original judgment, giving or rather continuing the vitality of the original judgment, with all its incidents, from the time of its rendition": *Lessee of Penn v. Klyne*, 1 Pet. C. C. 448. Hence the proceeding in Ohio, in January, 1889, must be regarded as a continuation only of the former suit or judgment. This seems to be admitted in the brief of counsel for plaintiffs, for it is stated that "reviving a judgment is the act by which a judgment which has lain dormant or without any action upon it for a year and a day is, at common law, again restored to its original force." The revivor of the Ohio judgment removes its dormant quality only, but does not affect the statute of limitations in this state, or in any way prevent its running against the judgment rendered in 1879.

We think, within the provisions of our civil code concerning limitations, the action upon the judgment ought to have been brought within five years after its rendition, if during all of that time Moore was personally present within this state. If brought after five years, it is too late. If, however, it be claimed that the revivor in Ohio is not a mere order that execution issue, but a new judgment, and therefore of full force as a new judgment of the date of January, 1889, no action can be brought thereon in this state, because Moore was not personally served in the proceeding for revivor, or entered any appearance therein: *Kay v. Walter*, 28 Kan. 112. In the last case this court decided that a judgment rendered in Pennsylvania on May 26, 1864, and revived in 1867, and again in 1877, but sued on in this state in 1881, "was unquestionably barred by the five years' statute of limitations."

In the case of *Hepler v. Davis*, 32 Neb. 556, 29 Am. St. Rep. 457, a judgment was recovered against A, in Illinois, in 1879. A removed to Nebraska soon afterward, and continued to reside in that state. In 1888 the judgment was revived in Illi-

nois without personal service upon A, or an appearance by him. In December, 1888, nine years after the judgment was rendered, an action was brought upon it in Nebraska. In that state, as in ours, the limitation of five years as to judgment exists. It was held in that case, Maxwell, J., delivering the opinion, that an action upon a judgment of a sister state must be brought in Nebraska within five years, or it will be barred, and that the alleged revivor of the judgment in Illinois, in 1888, did not remove the bar of the statute of Nebraska. That case is very similar to this one. See also *Eaton v. Hasty*, 6 Neb. 419; 29 Am. Rep. 365; *Tessier v. Englehart*, 18 Neb. 167; *Marx v. Kilpatrick*, 25 Neb. 107.

Moore having resided in this state for five years after the original judgment against him was rendered, and before the alleged revivor or the commencement of this action, our statute of limitations prevents any action upon the judgment from being maintained.

The ruling and judgment of the district court will be affirmed.

LIMITATIONS OF ACTIONS — CONFLICT OF LAWS — ACTION ON JUDGMENTS. — In an action brought in one state on a judgment recovered in another, the law where the remedy is sought prevails, and the statute of limitations of the former state is operative: *Jones v. Hook*, 2 Rand. 303; 14 Am. Dec. 783. In *Evans v. Cleary*, 125 Pa. St. 204, 11 Am. St. Rep. 886, it was held that in the absence of proof of the statute of the foreign state, in an action of this kind, putting a judgment there upon the footing of simple contract debt with regard to the statute of limitations, the law of such foreign state would be presumed to be the same as that of Pennsylvania. See also note to this case.

STATUTE OF LIMITATIONS — JUDGMENT — REVIVOR. — Where a judgment recovered in one state is there revived against the defendant without jurisdiction of his person, and after his removal to another state, such revivor will not prevent the running of the statute of limitations against the revived judgment in the latter state: *Hepler v. Davis*, 32 Neb. 556; 29 Am. St. Rep. 457, and note.

SCIRE FACIAS TO REVIVE JUDGMENT — NOT NEW ACTION. — *Scire facias* to revive a dormant judgment is a mere continuance of the former action: *Irvine v. Nixon*, 11 Pa. St. 419; 51 Am. Dec. 559, and note.

HANDLEY v. HARRIS.

[48 KANSAS, 606.]

CHATTEL MORTGAGES, AND CONFLICT OF LAWS. — A CHATTEL MORTGAGE EXECUTED IN ANOTHER STATE should be given such effect as it is entitled to in the state wherein it was executed.

CHATTEL MORTGAGES. — REMOVAL TO ANOTHER STATE OF PROPERTY which is subject to a chattel mortgage duly executed and recorded in the state where the property was situated when it was made does not destroy the lien, and the mortgage may be enforced against an innocent purchaser in the state to which the property was removed. The constructive notice imparted by the recording of the mortgage extends to wherever the property may be removed.

W. D. Webb and Grant W. Harrington, for the plaintiff in error.

James Falloon, for the defendant in error.

GREEN, C. This was an action in replevin, to recover certain personal property claimed by the plaintiff below under a chattel mortgage duly executed and filed in the office of the county clerk of Richardson County, Nebraska, on the twenty-eighth day of July, 1886. The property was removed to Horton, in Brown County, some time in November or December, 1887, and sold by the mortgagor to the plaintiff in error, who had no knowledge of the existence of the Nebraska mortgage. The jury returned a verdict for the plaintiff, and the defendant below brings the case here for review.

It is first urged that the district court erred in admitting in evidence the statutes of Nebraska in relation to chattel mortgages. We think this evidence was competent under the allegations of the petition. It was alleged that the plaintiff had a special ownership in the property replevied, under a chattel mortgage duly executed and filed in the office of the county clerk of Richardson County, Nebraska; that at the time the mortgage was executed the parties were residents of that county, and the property was situated there; that by the laws of the state of Nebraska the county clerk's office is the proper place to file chattel mortgages, in order to impart constructive notice to third parties; that a chattel mortgage to secure promissory notes is good, and imparts notice for five years after filing the same in the county clerk's office, without making any affidavit to renew the same. The plaintiff below had a right to show that the chattel mortgage was valid in the state where it was executed. "The law of the place of con-

tract, when this is also the place where the property is, governs as to the nature, validity, construction, and effect of a mortgage, which will be enforced in another state as a matter of comity, although not executed or recorded according to the requirements of the law of the latter state": Jones on Chattel Mortgages, sec. 299. A chattel mortgage executed in another state should be given such effect as it is entitled to in the state where it is executed: *Blystone v. Burgett*, 10 Ind. 28; 68 Am. Dec. 658.

The claim is next made that the court should not have admitted in evidence the chattel mortgage. The execution of the mortgage was not challenged by a verified answer, so that its introduction was immaterial.

It is further claimed by the plaintiff in error that the mortgagee knew that the property described in the chattel mortgage had been removed to Kansas in November or December, 1887, and that he permitted the property to remain there until the month of April, 1888, without claiming the same, and was therefore guilty of such laches as would bar him of all right to recover the property from an innocent purchaser for value, as the plaintiff in error claimed to be. We do not think that the mortgagee was guilty of such laches as precluded a right of recovery. The mortgage was properly recorded in Nebraska, where the parties resided and the property was situated at the time it was executed. The plaintiff thus obtained a title to the property, absolute or qualified, by the laws of another state, and was entitled to maintain and enforce his right to the property in this state. Where personal property has been mortgaged and left in the possession of the mortgagor, and the mortgage is duly recorded, a subsequent removal of the mortgagor to another state does not make a new record of the mortgage necessary in the county and state to which the mortgagor has removed with the property: *Offutt v. Flagg*, 10 N. H. 47; *Langworthy v. Little*, 12 Cush. 111.

"If the holder of property has recently come from an adjoining state, there may be a mortgage upon the property in that state; and a purchaser or creditor must exercise his diligence by inquiring there whether the property is encumbered, just as, when the owner has recently removed from another part of the same state, the purchaser or creditor is bound to inquire at such former residence of the owner for encumbrances there recorded": Jones on Chattel Mortgages, sec. 260.

The supreme court of Iowa has held that the constructive

notice imparted by the recording of a chattel mortgage is not confined to the county or state where the mortgage was executed and the property then was, but extends to wherever the property may be removed: *Smith v. McLean*, 24 Iowa, 323. The following authorities sustain this doctrine: *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62; *Hoit v. Remick*, 11 N. H. 285; *Whitney v. Heywood*, 6 Cush. 82; *Barrows v. Turner*, 50 Me. 127; *Hicks v. Williams*, 17 Barb. 523; *Cool v. Roche*, 20 Neb. 550; *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258; *Mumford v. Canty*, 50 Ill. 370; 99 Am. Dec. 525; *Beall v. Williamson*, 14 Ala. 55; *Feurt v. Rowell*, 62 Mo. 525.

Complaint is made of the instruction given and the refusal of instruction requested. Substantially the same questions are raised by the instructions as those we have already discussed, and we need not consider them further.

It is recommended that the judgment of the district court be affirmed.

The COURT. It is so ordered.

CHATTEL MORTGAGES — EXTRATERRITORIAL EFFECT. — Where the mortgagor of personal property situated in one state, in which the mortgage is recorded, removes it to another, and the property is attached and sold to satisfy judgments obtained against him, by creditors in the latter state, the mortgagee can recover the value of the mortgaged property from such judgment creditors in the state where the mortgage was recorded and executed, although the mortgage was not recorded in the other state: *Hornthal v. Burwell*, 109 N. C. 10; 26 Am. St. Rep. 556, and note. In *Johnson v. Hughes*, 89 Ala. 589, it was held that, where personal property was brought into Alabama subject to a mortgage which had been duly executed and recorded in another state, and the mortgage was recorded in Alabama within four months after the removal of the property, its lien was superior to that of an attachment levied on the property prior to such registration. The recording of a chattel mortgage in one state has no extraterritorial effect in another state as notice of a lien: *Corbett v. Littlefield*, 84 Mich. 30; 22 Am. St. Rep. 681, and note. See *Bank v. Davidson*, 18 Or. 58, as to the law of what state governs the validity of provisions in notes secured by chattel mortgages. As to the effect of the removal to another state of personal property on which there is a chattel mortgage, see *Kanaga v. Taylor*, 7 Ohio St. 134; 70 Am. Dec. 62, and extended note 67-72, thoroughly discussing the subject. The case of *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525, and note, cited in the opinion, is in accord with the leading case.

THE PRINCIPAL CASE was cited and followed, with respect to the effect of the removal to another state of property subject to a chattel mortgage, in *Ord Nat. Bank v. Massey*, 48 Kan. 762.

GEORGE v. HUNTER.

[48 KANSAS, 651.]

EXECUTION — EXEMPTION OF GRAIN FOR SUPPORT. — Under a statute exempting from execution grain, meat, vegetables, groceries, and other provisions on hand necessary for the support of the debtor and his family for one year, he is entitled only to the grain necessary for food of himself and family for that time, and is not entitled to hold as exempt an amount of grain sufficient, in the absence of other property, to support him and them for a year.

H. E. Shafer, for the plaintiff in error.

Lafferty and Sternberg, for the defendant in error.

STRANG, C. Action for replevin for an undivided two-thirds interest in six stacks of wheat. A. S. Hunter, a farmer, raised upon the land of his father six stacks of wheat, in all four hundred bushels. Two thirds of said wheat belonged to him and the other third to his father. He was indebted to W. B. Power, assignee of J. E. Hayner & Co., on a note. Power sued him on said note before a magistrate and recovered a judgment, upon which an execution was issued, which was placed in the hands of H. S. George, a constable of the township, who levied the same upon Hunter's interest in said wheat, and this action of replevin was brought by Hunter to recover the wheat from the constable. The case was tried by the court and a jury, and resulted in a verdict and judgment for the plaintiff, and the defendant, the constable, brings the case here for review, and assigns the following errors: 1. The court erred in the admission of testimony; 2. Error in the instructions given.

The case involves the construction of the seventh subdivision of paragraph 2998 of the law exempting property from levy and sale on execution. The language of the seventh subdivision of said paragraph is as follows: "The grain, meat, vegetables, groceries, and other provisions on hand necessary for the support of the debtor and his family for one year, and also all the fuel on-hand necessary for their use for one year."

The plaintiff below contended that the word "support," as used in the statute, is to be construed literally, and means grain enough, in the absence of other property, to support the family for a year. That is, if a debtor has one thousand bushels of wheat, and no meat, vegetables, groceries, or other provisions, he may have sufficient wheat exempt to not only bread his family for one year, but sufficient also to sell, and

purchase meat, groceries, and other provisions, as well as necessary wearing apparel, for the use of the family for one year; while the contention of the defendant below is, that the word "support," as used in the statute, means, and should be construed to mean, grain sufficient to bread the family for one year. The language of subdivision 6 of the paragraph is, "the necessary food for the support of the stock mentioned in this section for one year." It will not be said that the word "support," in this subdivision, means anything more than sufficient food to feed the stock for a year, and we think the word "support," in the seventh subdivision, is employed in the same sense, and simply means, in connection with the other substantive words therein, grain, meat, or groceries on hand sufficient to feed the family for one year, or sufficient for the use of the family as food for one year. If a family has on hand one thousand bushels of wheat, but no meat or groceries, we do not think they may have as exempt sufficient wheat to bread the family a year, and in addition thereto sufficient to sell and purchase meat and groceries, or vegetables or other provisions. If the construction contended for by the plaintiff is correct, then, by the same reasoning, if the family had on hand a stock of groceries worth one thousand dollars, but had no grain, or meat, or vegetables, or "other provisions," they might have exempt the whole stock, provided there was no more than sufficient, in addition to the necessary groceries for use of the family, when sold, to purchase grain, meat, vegetables, and other provisions for the use of the family for one year. But such a construction in relation to groceries would conflict with the provisions of subdivision 8 of the paragraph. This court has held that the exemption laws of the state must be construed liberally in favor of the debtor, but the provisions of the several subdivisions of the exemption law must not, through a desire to be liberal to the debtor, be warped out of all harmony with each other, nor must such a construction be put upon any of its provisions as to render it uncertain and variable in its application, but it must be so construed as to give it a uniform application to each individual debtor as to all objects of the same class. The amount of exemption, or the benefit to be derived from any particular class of property, cannot be made to depend upon the possession or want of possession by the debtor of any of the other classes of property made exempt by any of the provisions of the exemption law.

We do not think that the construction put upon the word "support," in the seventh subdivision of the paragraph referred to, is tenable. It follows, therefore, that the evidence introduced for the purpose of showing what it would cost to support the debtor and his family for a year, and that the whole of his share of the wheat in the six stacks was not worth more than enough to support the family for a year, was improperly received, and constitutes error. The court also erred in the construction put upon the word "support," in its charge to the jury. For these reasons, it is recommended that the judgment of the court below be reversed, and the case sent back for a new trial.

The COURT. It is so ordered.

EXECUTION — EXEMPTION — ARTICLES OF FOOD. — Newly dug potatoes are exempt from execution under a statute exempting "necessary vegetables actually provided for family use": *Carpenter v. Herrington*, 25 Wend. 370; 37 Am. Dec. 239, and note. Butter made from a debtor's only cow is exempt from attachment and execution: *Leavitt v. Metcalf*, 2 Vt. 342; 19 Am. Dec. 718. Meat purchased by a dealer, to be sold again in the usual course of his trade, is not exempt from attachment as provisions: *Bond v. Tucker*, 65 N. H. 165.

PETERSON v. WOOLLEN.

[48 KANSAS, 770.]

ESTOPPEL. — A REDELIVERY BOND ESTOPS THE SURETY from subsequently claiming the property as against the sheriff or the attachment plaintiff, unless the surety was induced to sign the bond by a fraudulent misrepresentation of the facts. A statement by the officer who takes the bond, concerning its legal effect, does not entitle the surety to escape from his bond, or to insist that the property was his.

S. D. Decker, for the plaintiff in error.

C. Angevine, for the defendants in error.

STRANG, C. January 22, 1889, the plaintiff, who was plaintiff below, filed her petition in replevin, alleging absolute ownership in herself of certain personal property, the right to immediate possession, and wrongful detention of the same. The answer admitted the taking of the property by the defendant Woollen, sheriff of the county, on an attachment issued in the suit of Case, Bishop, & Co. against Henry Peterson, husband of the plaintiff, but as an answer to the plaintiff's claim to said property, and as matter of estoppel, alleged

that when said property was attached as the property of Henry Peterson, the plaintiff joined said Henry Peterson in executing a redelivery bond for the return of said property. To the answer the plaintiff replied that the defendant should not be allowed to avail himself of the matter of estoppel set out in his answer, because the officer, having such property in his hands as the property of Henry Peterson, obtained her signature to said redelivery bond by fraudulent misrepresentations. A demurrer was filed to the reply, alleging that the facts therein stated were insufficient to avoid the answer. This demurrer was sustained. The plaintiff refused to plead over, and brings the case here for error.

The only question in the case is, Was the plaintiff estopped from recovering in her action by reason of having joined her husband in the execution of a redelivery bond when the same property was attached as his property in a proceeding against him in favor of the defendants Case, Bishop, & Co.? It is well settled that signing a redelivery bond as surety estops the surety from subsequently claiming the property as against the sheriff or the attachment plaintiff, unless the surety was induced to sign the redelivery bond by a fraudulent misrepresentation of facts: *Sponenbarger v. Lemert*, 23 Kan. 55; *Hartun v. Sizer*, 23 Kan. 310; *Wolf v. Hahn*, 28 Kan. 588.

In this case the defendants claim that the plaintiff is estopped from claiming the property described in her petition by having signed the redelivery bond with her husband, when the property was attached in a proceeding against him by Case, Bishop, & Co. The plaintiff admits signing the redelivery bond, but says she is not thereby estopped from claiming the property, because she was induced to sign the redelivery bond by fraudulent misrepresentations made by the officer who took the bond. The defendants answer this proposition by saying that there was no misrepresentation of facts by the officer when the plaintiff signed the redelivery bond, and that any statement by the officer as to the effect of her signing the bond was simply the opinion of the officer as to the legal effect of her act, and will not aid her to avoid the estoppel created by signing the redelivery bond. The allegation in the reply is, that the officer told the plaintiff that "if she would sign the bond, they would let her keep the property; but that unless she signed the bond they would take the property from her; but if she signed they would stand between her and all harm, and she would save her property; that the signing of said

bond would not affect her rights in such property, nor prevent her from claiming the same."

Now, were these statements of the sheriff and his deputies to the plaintiff a misrepresentation of facts, or a mere opinion as to the legal effect of her act in signing said bond? We think they amount to no more than an opinion of the legal effect of her signature as a surety on said bond. She was fully apprised of all the facts surrounding the subject. She knew that Case, Bishop, & Co. had begun an attachment proceeding against her husband, and that the officer had attached the property in question as his property, and that the officer would remove the property unless a redelivery bond was executed, and that if the bond was executed the property would not be removed by the officer, because he so informed her. She also knew, if true, that the property attached as the property of her husband belonged to her. These were all the facts necessary for her to be in possession of, so far as the transaction was concerned. She was in possession of all these facts, without reference to the statement of the officer to her, except perhaps the fact that unless a bond was executed, the officer would remove the goods. His statement to that effect was not a misrepresentation of a fact, since the law made it his duty to remove the goods unless a redelivery bond was given. What it is likely the plaintiff did not know was, the law in relation to the legal effect of her act in signing the bond, although in law it is presumed that she did know. Not knowing the legal effect of her act in executing with her husband the redelivery bond, she relied on the opinion of the officer, and was misled. But in law she had no right to rely on the opinion of the officer, or of any person whose interest was adverse to her own; hence the fact that she did rely on the opinion of the officer, and was thus misled, will not aid her in avoiding the estoppel created by signing the bond: *Fish v. Cleland*, 33 Ill. 243; *Upton v. Tribilcock*, 91 U. S. 45-50; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Dillman v. Nadlehoffer*, 119 Ill. 567; *Reed v. Sidener*, 32 Ind. 373; *Jaggard v. Winslow*, 30 Minn. 263; *Catlin v. Fletcher*, 9 Minn. 85; *Kenyon v. Wetly*, 20 Cal. 637; 81 Am. Dec. 137; *Corning v. Grohe*, 65 Iowa, 328; *Glenn v. Statler*, 42 Iowa, 107.

It is recommended that the judgment of the district court be affirmed.

The COURT. It is so ordered.

ESTOPPEL — REDELIVERY BOND. — A person who binds himself to hold the proceeds of certain property subject to the order of court, and thereby obtains the release of an attachment, and the possession of the property attached, is estopped from denying that the sheriff had a right in the property attached: *Morgan v. Furst*, 4 Martin, N. S., 116; 16 Am. Dec. 166; to the same effect, see *Martin v. Gilbert*, 19 N. Y. 298; 16 Am. St. Rep. 823, and note. One who gives a forthcoming bond in an action of claim and delivery is estopped from denying that the property was in his possession at the commencement of the action: *Benesch v. Wagner*, 12 Col. 534; 13 Am. St. Rep. 254, and note. When a judgment upon which an execution is issued and levied is void, the party giving a redelivery bond, and thereby obtaining the right to retain the property levied upon, is not estopped from afterwards asserting that the judgment and execution are void: *Olsen v. Nunnally*, 47 Kan. 391; 27 Am. St. Rep. 296.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

SNOW v. MT. DESERT ISLAND REAL ESTATE CO.

[84 MAINE, 14.]

CONVEYANCES — DESCRIPTION. — A CONVEYANCE DESCRIBING A BOUNDARY LINE AS BEGINNING AT THE SEA, and then, after various calls, as running to the shore, includes the shore to low-water mark.

Deasy and Higgins, for the plaintiff.

Wiswell, King, and Peters, and B. E. Tracy, for the defendants.

EMERY, J. This is a real action to recover possession of certain flats between high and low water mark of the sea, at Bar Harbor. The plaintiff claims under a deed containing the following description: "Beginning at the sea, on Benjamin Ash's line; thence south on said Ash's line to the highway; thence west on the highway ten rods to a stake; thence north to the shore parallel with said Ash's line; thence east to the first bounds mentioned." The report of the case states the question submitted to be, whether the above deed conveys the flats or shore with the upland. That is the only question argued by counsel, and the only one we now consider.

It is said that land cannot be appurtenant to land; yet the shore, or flats, in front of upland are usually regarded as appurtenant to the upland. While they may be held in private ownership under our law, they are yet subject to the public right of navigation and fishing. Annexed to the upland, they may be of great value to the common owner. Apart from the upland, they are rarely of any value to a private owner, who would have no access to them except by water. The colonial ordinance of 1641-47 permitting private ownership in flats

evidently contemplated their annexation to the upland in ownership. The language of the ordinance is: "It is declared that in all creeks, coves, and other places about and upon salt water where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to low-water mark," etc. It is also common knowledge that since the ordinance the occupation of the flats has usually followed that of the upland, and that the flats are usually of no value without the upland. Conveyances of the upland are commonly supposed to convey the flats.

The principle of annexation is well stated by Chief Justice Shaw in *Doane v. Willicutt*, 5 Gray, 335, 66 Am. Dec. 373, cited by plaintiff's counsel, as follows: "In a conveyance, when a line of shore is used as an abuttal, unexplained by circumstances, it may be ambiguous, leaving it doubtful whether the sea side or the land side of the shore is intended. . . . When both terms are used, 'the sea,' or 'shore,' and used to designate one boundary, it appears quite clear that they were intended to describe that side of the beach on which the sea coincides with it, and therefore to include the beach to low-water mark. . . . The owner of the upland adjoining tide-water *prima facie* owns to low-water mark; and does so in fact, unless the presumption is rebutted by proof" to the contrary.

In the case before us, the deed was given in 1867, when there was no natural separableness between the upland and its attendant shore, even if there be now. Nothing appears in the case showing any motive or reason for a separation. Nothing appears showing the beach at that date to be of any value apart from the upland, of any value to reserve in granting the upland, either by reason of wharves or weirs thereon, or by reason of any other opportunity for separate occupation or *quasi* cultivation like those far-reaching shores and beaches in the western part of the state, which in themselves are often more valuable than the upland.

Recurring now to the language of the deed in this case, which describes the boundary line of the conveyed parcel as "beginning at the sea," thence running round the parcel to "the shore," thence to the "first bounds mentioned," and reading the words in the light of the principles and circumstances above stated, it is not difficult to determine that they were intended to describe the sea side and not the land side of the shore, and thus include the shore to low-water mark. Such

is our opinion: *Erskine v. Moulton*, 66 Me. 280; *King v. Young*, 76 Me. 76; 49 Am. Rep. 596; *Stevens v. King*, 76 Me. 197; 49 Am. Rep. 609.

Of course, the owner of the upland and the adjoining shore may convey the one and retain the other. When such an intent appears, the court will give it full effect, as was done in *Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155; but no such intent appears in this case. The question here submitted must be determined in the plaintiff's favor.

DEEDS — BOUNDARIES. — As to the meaning of the words "to" and "from," in descriptions of boundaries, see note to *Oakes v. De Lancy*, 28 Am. St. Rep. 631. As the rights of a riparian proprietor on tidal waters are, in the absence of statutes modifying the common-law rule, bounded by the line of high water, it is manifest that the decision of the court in the principal case must be read strictly with reference to the provisions of the colonial ordinance, which extended the rights of those proprietors to low-water mark, wherever the distance did not exceed one hundred rods. Under the common-law rule, the question whether the inner or outer side of the shore was meant to be the *terminus ad quem* of the boundary line running towards it could not have arisen, for private ownership always ended at the inner side. The result of the change of law, whereby the flats were vested in the adjacent proprietors, was, that a conveyance of land bounded by or upon a sea, or bay, or harbor, or stream should be construed as passing the adjacent flats, if they belonged to the grantor: See cases cited in the note to *Allen v. Weber*, 27 Am. St. Rep. 57. A similar rule prevails in Pennsylvania, where it is held that when the bank of a navigable stream is called for as a boundary in a deed, the law will presume the grantor's intention to have been to carry the line to low-water mark: *Palmer v. Farrell*, 129 Pa. St. 162; 15 Am. St. Rep. 708. In regard to boundaries on waters generally, see, in addition to the notes already mentioned, the notes to *Arnold v. Mundy*, 10 Am. Dec. 385-389; and *Miller v. Mendenhall*, 19 Am. St. Rep. 235.

FILES v. STEVENS.

[84 MAINE, 84.]

EXEMPTION OF FARM TOOLS, WHO NOT ENTITLED TO. — A statute of exemption is construed with reference to the situation and vocation of the owners of property, and therefore a statute exempting from execution certain implements of agriculture will not entitle a merchant, part of whose stock in trade consists of such implements, to hold them, or any of them, as exempt from execution.

Fox and Gentleman, for the plaintiff.

Fred V. Matthews, for the defendant.

VIRGIN, J. Prior to August 6, 1890, the plaintiff was a trader. On that day his creditors filed their petition in the court of insolvency, praying that he be declared insolvent. Thereupon the defendant, as messenger, under a warrant from the judge of insolvency, seized the plaintiff's stock in trade, among which were four new plows and two new harrows.

On September 3, 1890, the plaintiff was duly declared an insolvent, whereupon the defendant, on the petition of the plaintiff's creditors, was ordered by the judge of the insolvent court to sell the stock. Prior to the sale, the plaintiff claimed, under clause 9, section 62, chapter 81, of the Revised Statutes, that one of the plows and one of the harrows (without designating which of them) were exempt from attachment; but the defendant sold the whole of the stock, and the plaintiff brought this action of trover to recover the value of one plow and one harrow.

We are of opinion that the plow and harrow were not exempt. The case finds that the plaintiff had these agricultural implements for sale simply, and that he neither owned nor leased a farm. The statute of exemption is to be construed with reference to the situation and vocation of the owners of property. A merchant cannot claim such implements to be exempt, any more than he could a boat which he had no occasion to use as a fisherman, or corn or grain for himself and family, when he was unmarried, and had no family, and was a boarder: *Blake v. Baker*, 41 Me. 80; or hay for cows and sheep when he had neither: *Foss v. Stewart*, 14 Me. 312. The evident object of the statute is that; not that any one may own and claim to be exempted all the various kinds of chattels therein enumerated, but that persons should not be deprived of the simple means by which they gained a livelihood in their respective vocations.

Judgment for defendant. _____

EXEMPTION OF TOOLS AND UTENSILS: See notes to *Kilburn v. Demming*, 21 Am. Dec. 545-554; *Baker v. Willis*, 25 Am. Rep. 63-67; *Richards v. Hubbard*, 47 Am. Rep. 190-192; *In re McManus*, 22 Am. St. Rep. 253. A statute, without naming any classes of persons entitled to exemption of property from execution, exempted "other farming utensils, including tackle for teams, not exceeding fifty dollars in value." A judgment debtor, not a farmer, nor engaged in any business requiring the use of a mowing-machine, owned one of less than the exempt value. Held, that the machine was exempt: *Humphrey v. Taylor*, 45 Wis. 251; 30 Am. Rep. 738. But a horse is not an implement of trade when used by a mechanic in the tanning business,

and is therefore not exempt. Under the Minnesota statute, a milliner's stock in trade cannot be claimed as exempt to the amount of four hundred dollars, when the articles comprising such stock are kept for sale or for manufacture, and are treated as merchandise by their owner: *Hillyer v. Revere*, 42 Minn. 254. Nor can a person double his exemption from sale on execution under the Wisconsin statute, which exempts "the tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business," by carrying on the business both of a mechanic and a miner at the same time: *Knapp v. Bartlett*, 23 Wis. 68; 99 Am. Dec. 100.

THORN v. PINKHAM.

[84 MAINE, 101.]

DURESS. — TO THREATEN ONE with a criminal prosecution or a civil action is not duress, when he is believed in good faith to be liable to such suit or prosecution.

CONSIDERATION. — PROMISSORY NOTE GIVEN FOR MONEYS WHICH THE MAKER HAS EMBEZZLED is founded upon a good consideration, and cannot be avoided on the ground that it was procured by threatening to prosecute him for his embezzlement.

PRINCIPAL AND SURETY. — Agreement to retain the maker of a note in the payee's employment "so long as he does well," and to credit a certain portion of his wages on the note, does not release the sureties thereon, when the maker is discharged from service before the note becomes due, and the time of payment is never extended beyond the maturity of the note.

PRINCIPAL AND SURETY — NEGLECT TO APPLY SECURITIES. — If the maker of a note gives a chattel mortgage to secure its payment, the fact that the mortgagor disposes of some of the mortgaged chattels, and the mortgagee takes no measures to recover them, does not release the surety on the note if the mortgagee consented to the disposition of the property by the mortgagor.

Heath and Tuell, and Farr and Lynch, for the plaintiff.

L. T. Carleton and F. E. Bean, for the defendants.

HASKELL, J. *Assumpsit* on a promissory note for \$370, payable in twelve months, given by one Frank L. Pinkham for moneys of the plaintiff that he had embezzled, and signed by the defendants, his father and a relative, as sureties. The verdict was for defendants, and the case comes up on motion and exceptions.

1. It is contended that the note was obtained by duress, and that the consideration was illegal. Suppose the embezzler had been plainly told that unless he paid or secured the amount that he had stolen, he would be prosecuted for the

theft, and thereupon gave the note. That would not have been duress. "It is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution": *Hilborn v. Bucknam*, 78 Me. 485; 57 Am. Rep. 816. Money stolen may be recovered in *assumpsit*: *Howe v. Clancey*, 53 Me. 130; *a fortiori* is money embezzled a good consideration for a promise to refund it.

2. It is claimed that the sureties were discharged by the giving of time to the principal debtor. It appears that when the note was given it was agreed that he might continue in the plaintiff's service "so long as he did well," and pay from his wages twenty-four dollars a month on the note. After three payments, amounting to fifty-six dollars, he was discovered short in his accounts and discharged. The agreement to accept monthly payments of twenty-four dollars each, if unconditional, would have extended payment of the balance due on the note at maturity over a period of more than three months. If these payments had been regularly made until the note fell due, February 18-21, 1890, there would have remained eighty-two dollars, exclusive of interest, unpaid, to be met in four monthly payments.

The pertinent inquiry is, Did the agreement, assuming that it was made upon sufficient consideration, operate as an extension of time for the payment of the note? The agreement arose from the mutual promises of the parties relating to the continued employment of a servant. The master promised wages, to be applied in part to an existing indebtedness of the servant, "so long as he did well." The agreement contained a stipulation for continued service, like a condition precedent to the validity of a contract; and when the condition failed, the agreement failed with it; so that, as the agreement was not absolute, no agreement for extending the time of payment on the note existed when the day of payment came. Had the condition been kept, the result might be otherwise, for, when the note fell due, had the time of payment been extended for a single day, the suretyship would have no longer remained "sure," and the sureties need not "smart for it": *Berry v. Pullen*, 69 Me. 101; 31 Am. Rep. 248; *Gifford v. Allen*, 3 Met. 255.

3. It is argued that the sureties are discharged by the plaintiff's neglect to apply on the note security given by the

principal. It appears that, shortly after the note was given, the principal gave to the plaintiff a mortgage of his household furniture to secure the payment of the note. The mortgage stipulated that the principal debtor, the mortgagor, might retain possession of the mortgaged chattels until the note should become due. It further appears that the plaintiff had notice, before the maturity of the note, that the mortgagor had disposed of some, at least, of the mortgaged chattels, but took no action until the bringing of this suit against the sureties, less than thirty days after the note fell due.

Until the maturity of the note, the plaintiff had no right to the possession of the mortgaged chattels under the terms of the mortgage. He did no act to release his lien upon the security. Mere forbearance to follow the security for so short a period cannot be considered a violation of the rights of the sureties. When the note matured they could have immediately paid it, and thereby become subrogated to all rights of the mortgagee: *Berry v. Pullen*, 69 Me. 101; 31 Am. Rep. 248; *Cummings v. Little*, 45 Me. 183. The plaintiff was not bound to resort to the debtor's property before calling upon the sureties: *Fuller v. Loring*, 42 Me. 481. If the plaintiff had voluntarily surrendered his security, he would have discharged the sureties: *Springer v. Toothaker*, 43 Me. 381; 69 Am. Dec. 66. If the plaintiff's lien under the mortgage had expired by his own laches, as in that case, his remedy against the sureties might be lost; but here no act of his has impaired his title under the mortgage. Up to the time this suit was brought, the sureties, on payment of the note, could have derived as much benefit from the mortgage as the plaintiff could have obtained.

Moreover, the instruction of the presiding justice, that if before the mortgage note fell due, the mortgagee was informed that the mortgagor "was disposing of the property, and endeavoring to put it beyond his reach, it was his duty to secure it and apply it to the payment of the note," is manifestly erroneous. The verdict is against law.

Motion and exceptions sustained.

DURESS PER MINAS. — A threat of legal process, or legal prosecution, or legal imprisonment does not constitute duress *per minas*. See cases cited in notes to *Adams v. Irving Nat. Bank*, 15 Am. St. Rep. 453; *Cribbs v. Soule*, 24 Am. St. Rep. 172; and compare note to *Mayor of Baltimore v. Lefferman*, 45 Am. Dec. 153-171, as to the cognate subject of compulsory payments. But it would appear that, while such threats do not amount to duress when

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addressed to the party who is liable to be made the defendant in the legal proceedings threatened, they will avoid a contract entered into by persons holding certain relationships with him, where the abandonment of those legal proceedings is the consideration for such contract: See *Adams v. Irving Nat. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447, and the authorities cited in the opinion. The relationships of husband and wife and parent and child are the only ones mentioned in the opinion in that case; but in *Schultz v. Cullin*, 78 Wis. 611, the same rule was applied to a case in which a note signed by a sister, because of threats by the payee to prosecute her brother for a crime, and in order to avoid such prosecution, was held incapable of enforcement against her by such payee. *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147, was a case in which a contract of indemnity obtained from a wife by a threat to prosecute her husband was allowed to stand, but the decision was based upon the fact that the representations which induced the contract were made by members of her own family, and not by the person who had it in his power to prosecute. The principle of this case, it would seem, is, that the threats will not avoid the contract, unless made directly by the prosecutor, or by some one having authority to communicate them, or uttered in a manner which shows that they are intended to be reported to the person whom it is desired to influence, and were actually so reported. It is doubtful, however, whether this destination is tenable. If the compulsion was actually brought to bear upon the wife or relative, it does not seem very material by what agency or in what manner it is applied. The ground upon which such contracts are avoided is that of misrepresentation and undue influence: *Adams v. Irving Nat. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447. It is an elementary principle that no one shall be allowed to profit by another's fraud. Why, then, should the bank in this case have been permitted to reap the advantages of a transaction which was induced by means which deprived the wife of her free agency, and was therefore fraudulent? It is true that, under the given circumstances, the contract amounted to the compounding of a felony, and, being executed, left both parties in *pari delicto*. The wife was therefore not in a position to ask for relief. The court rests its decision principally on this ground, and we venture to think it the only ground on which it can rest.

PRINCIPAL AND SURETY. — The general rule is, that any material change in the contract without the assent of the surety will release the surety: See notes to *First Nat. Bank v. Gerke*, 6 Am. St. Rep. 458; *Pritch v. Dime Sav. Bank*, 7 Am. St. Rep. 372. But the agreement to give time must be a valid and binding one, or the surety will not be released: *Davis v. Stout*, 126 Ind. 12; 22 Am. St. Rep. 565, and note. Thus where a composition agreement, under seal, which never took effect, because not signed by all the creditors, without which signing it was, by its terms, not to be binding, contemplated the debtor's release upon the payment of a certain percentage of the debts on or before a certain date, and was signed, among other creditors, by the payee of a promissory note made by the debtor as principal and by another as surety, it was held that there was no such extension of time as would discharge the surety: *Day v. Jones*, 150 Mass. 231. Nor does the acceptance by the payee of a promissory note from the principal, payable one day after date, and a *cognovit* confessing judgment on the same and shortening the time of obtaining it, there being no agreement by the payee not to proceed on the old indebtedness until the note becomes due, constitute an extension of time within the rule releasing sureties: *Merriam v. Barker*, 121 Ind. 74. Nor, where the agree-

ment to give time is void for want of consideration, will the surety be released: *Franklin Bank v. Severn*, 124 Ind. 317. The same result will follow if the surety knows of and assents to the extension of time: *Rockville Nat. Bank v. Holt*, 58 Conn. 526; 18 Am. St. Rep. 293. And a surety on a note, who holds ample collateral security from his principal, is estopped from taking advantage of enlargement of time of payment: *Smith v. Steele*, 25 Vt. 427; 60 Am. Dec. 276.

PRINCIPAL AND SURETY — PARTING WITH SECURITIES. — If a creditor voluntarily parts with securities without the consent of the surety, the latter is discharged: *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119; 41 Am. Dec. 685; *Baker v. Briggs*, 8 Pick. 121; 19 Am. Dec. 311; *Oullum v. Emanuel*, 1 Ala. 23; 34 Am. Dec. 757; *Springer v. Toothaker*, 43 Me. 381; 69 Am. Dec. 66. The principal case is distinguished by the fact that the creditor had not, by any positive, voluntary act of his, impaired the security. It is an important question, however, to what extent merely passive conduct, in such a case, should be considered to entail the same legal consequences as a voluntary surrender of securities, or a refusal to use them. The reasoning of the court, as well as the condemnation passed at the close of the opinion upon the instruction given in the lower court, seems to assume that the duty of the creditor differs essentially, according as the debt is or is not mature when he omits to follow the security. This seems to be a somewhat doubtful distinction. The creditor, before the maturity of the debt, would, as mortgagee, have the right to protect himself by restraining the mortgagor from conveying away the property mortgaged, and, even supposing that he is content, as far as his own interests are concerned, to let matters take their course, it is difficult to see why he should not be bound to exercise that right for the benefit of the surety. To use the language of the same court in *Springer v. Toothaker*, 43 Me. 381, 69 Am. Dec. 66, "the contract of suretyship imports entire good faith and confidence in the whole transaction," and it would certainly seem to be an allowable application of the equitable principles which regulate relations of quasi trust to say, that as soon as the secured creditor receives notice of the impairment of the security by the debtor, it is incumbent on him to take action to protect the surety, and that the lapse of more than a reasonable period necessary for taking such action will be a neglect of duty which will render him chargeable with laches. From this point of view, it will be apparently quite immaterial whether the debt is or is not due. The obligation to protect the surety is as strong in the one case as the other. The essential question, in short, is, whether the security has been, or is in process of being, impaired by acts of the debtor, which the creditor is bound in equity and good conscience to prevent. If such circumstances calling for interference exist, it only remains to inquire whether reasonable diligence has been shown in restraining the debtor, and that must be decided according to the given facts of each case.

PULLEN v. HILLMAN.

[84 MAINE, 129.]

CONSTITUTIONAL LAW — INSOLVENCY. — DISCHARGE BY A STATE COURT of an insolvent from his debts cannot affect a creditor who was a non-resident of the state when the insolvency proceedings were begun, though he was a resident thereof when the debt was contracted, unless he proved his claim in the insolvency court, or otherwise appeared therein. Because the insolvency court did not have jurisdiction over him, it could not discharge his right of action to recover his debt.

INSOLVENCY. — JURISDICTION OF A STATE COURT TO DISCHARGE A CITIZEN OF THE STATE FROM HIS OBLIGATION TO A CITIZEN OF ANOTHER STATE, when the latter has not in any way submitted himself or his claim to such court, cannot exist, though the contract was made and was to be performed in the state in which the debtor resides, and the obligee was also a citizen of the state when the obligation was contracted.

CONFLICT OF LAWS. — CHOSSES IN ACTION have no *situs*, and follow the person of the creditor, and cannot be discharged by a court which has no jurisdiction over his person; and it cannot have such jurisdiction, unless, at the beginning of the proceedings, process could have been served on him within the state.

Henry Hudson, for the plaintiff.

J. F. Sprague, for the defendant.

EMERY, J. The contract which is the subject of this action was made within this state between citizens of this state, and was to be performed within this state. Subsequently, the promisor, the defendant, after regular proceedings in the proper court of insolvency in this state, was granted by that court a discharge from all his debts, under section 44, chapter 70, of the Revised Statutes. This discharge was properly pleaded in bar of this action, and it is conceded that it would be an effectual bar, if the promisee, the plaintiff, who was a citizen of this state at the time of making the contract, had also been a citizen of this state at the time of the proceedings in the court of insolvency. But the plaintiff, after the making of the contract, and before the beginning of the insolvency proceedings, had changed his residence from Maine to New York, and had become a citizen of the latter state, and had not since been in Maine. He did not prove his claim under this contract in the insolvency court, nor in any way appear therein.

It is urged that as the contract was made in Maine, to be performed in Maine, and both parties were citizens of Maine at the time, they must be held to have contracted with refer-

ence to the then existing insolvency law of Maine, which provided for this discharge from the contract. It is argued that the insolvent law should be read into the contract, and that therefore the contract must be held to stipulate for such a discharge as is here pleaded.

We think, however, the question is not one of the interpretation of a contract or statute, but is one of jurisdiction. Did the court of insolvency have the jurisdiction to discharge the defendant from this contract?

After much discussion by courts and jurists, and after some conflict of opinion, it must now be considered fully and firmly established as a general proposition that a state cannot give its courts any jurisdictional power to discharge a citizen of such state from his obligation to a citizen of another state, when the latter has not in any way submitted himself or his claim to such court. This proposition is not modified by the circumstance that the contract was made and was to be performed in the state in which the debtor resides. The place of the citizenship of the parties, not the place of the making or performing the contract, defines the jurisdiction of the court. All this is now so well settled by authority that it is not advisable to occupy space in repeating or even epitomizing the reasoning by which the courts finally reached this conclusion. The citation of a few cases out of many should be sufficient: *Felch v. Bugbee*, 48 Me. 9; 77 Am. Dec. 203; *Hills v. Carlton*, 74 Me. 156; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489.

Does the additional circumstance, in this case, that the plaintiff was a citizen of this state at the date of the contract, though not at the date of the insolvency proceedings, give the court of insolvency jurisdiction over his claim under this contract? To so hold is to hold that one who was a citizen of this state when he acquired here contractual rights, choses in action, against another citizen of this state leaves them behind him in this state subject to be discharged by the courts of this state without notice to him after he has become a citizen of another state. It is to hold that he who was once a citizen of this state cannot remove himself and his property from its jurisdiction. It is to hold that a citizen of another state coming into this state and making contracts here, to be performed here, has greater immunities than a citizen of our own state. Neither reason nor authority leads us to such a conclusion.

A state may indeed grant its courts jurisdiction over lands and goods within its limits, though the owner may reside beyond those limits. Such objects are visible and tangible, and though the title to them may follow the owner, the thing, the substance, is within the state. They have a *situs*. They can be taxed where they are situated. In such cases the owner may be presumed to have left such property in the possession of a local tenant or agent. But even then the specific property to be affected by the judgment of the court must be attached upon process, and such notice given as is feasible.

Contractual rights, obligations, mere choses in action, however, are not visible, nor tangible, nor local. They have no *situs*. They do not exist as things, as substances, within any territorial limits. They follow the person of the creditor. They are his, wherever he lives: *Saunders v. Weston*, 74 Me. 85. Even the taxing power of the state in which the debtor resides cannot reach them. Only the state of the creditor's residence can deal with them, at least during the lifetime of the creditor: *Osgood v. Maguire*, 61 N. Y. 524; *Bond Tax Cases*, 15 Wall. 300; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490. The only court, therefore, that can effectually discharge such a claim is the court that has jurisdiction over the person of the creditor himself. But unless the creditor voluntarily submits to the jurisdiction of the court, by taking some part in the proceedings before it, jurisdiction can only be acquired by service of process upon him within the territorial limits of the state establishing the court. Beyond those limits no process of any court has any force in acquiring jurisdiction of the person. This proposition is firmly settled by authority as well as by reason: *Lovejoy v. Albee*, 33 Me. 414; 54 Am. Dec. 630; *Baldwin v. Hale*, 1 Wall. 223; *Pennoyer v. Neff*, 95 U. S. 714.

Ability to serve process within the state is therefore the test of the court's power to acquire jurisdiction in any proceeding. If, at the beginning of the insolvency proceedings, the process of the court of insolvency could have been served on the plaintiff within the state, the court could have acquired jurisdiction over him by such service. The situation at that time, not at the date of the contract, is the criterion. If the plaintiff was then a citizen of this state, he could have been served with process and subjected to the jurisdiction of the court, although he may never before have been within the state, and although the contract may have been made and

was to be performed in another state. So much will be conceded by the defendant. But it follows that if the plaintiff was not then a citizen of this state (at the time of the insolvency proceedings), no process could have reached him, and he could not be subjected to the court's jurisdiction, even though for all his life before he may have resided within the state.

The defendant's counsel strenuously urges that such a conclusion will work great hardship upon a debtor, by enabling his home creditors to avoid his insolvency proceedings by removing from the state. If this be a hardship, the remedy is with Congress in the enactment of a uniform bankrupt law for all the states. The court cannot usurp the power or jurisdiction it does not have. Counsel also relies upon *Stoddard v. Harrington*, 100 Mass. 88, 1 Am. Rep. 92, 97 Am. Dec. 80, and upon some *dicta* in later opinions of the United States supreme court. The *dicta* have little weight, as the precise question was evidently not in the mind of the justices writing the opinions.

The length of this opinion shows our respect for the eminent court which pronounced the judgment in *Stoddard v. Harrington*, 100 Mass. 88, 1 Am. Rep. 92, 97 Am. Dec. 80, but we think that decision cannot be sustained, and that it must be overruled when the same question is again presented to that court. On the other hand, our conclusion is in harmony with that reached by the courts of New Hampshire and Vermont upon the same question: *Norris v. Atkinson*, 64 N. H. 87; *Roberts v. Atherton*, 60 Vt. 563; 6 Am. St. Rep. 133.

Defendant defaulted.

INSOLVENCY. — As to the effect of the discharge of an insolvent upon the rights of non-resident creditors, see extended note to *Murray v. Roberts*, 15 Am. St. Rep. 212-221. A discharge under state insolvent law is no bar to recovery on a note owned by one who, when the discharge was granted, was a citizen of another state, and in no way became a party to the insolvency proceedings, though the note was executed in the former state, and both parties thereto were, at the date of its execution, citizens of that state: *Roberts v. Atherton*, 60 Vt. 563; 6 Am. St. Rep. 133. An act declaring that a discharge granted thereunder shall "release the debtor from all claims, debts, liabilities, and demands set forth in his schedule," etc., does not apply to a judgment recovered out of this state, based upon a contract made and to be performed there, when the creditor in no wise participates in the proceedings in which the discharge is entered, although he may have been a resident of the state where the discharge was granted at the time of the insolvency proceedings: *Lowenberg v. Lemine*, 93 Cal. 215. Similarly, a discharge under the insolvency laws of Massachusetts is not a bar to the recovery

ery upon a contract made in that state, when it appears that it was to be performed elsewhere, and the plaintiff was not a resident of the state at the commencement of the proceedings: *Norris v. Atkinson*, 64 N. H. 87.

CONFLICT OF LAWS. — For the purposes of insolvency or other proceedings by creditors, debts or choses in action due the insolvent are treated as having a *situs* at the owner's domicile: *Matter of Dalpay*, 41 Minn. 532; 16 Am. St. Rep. 729. The same rule prevails for the purposes of taxation: *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386; 9 Am. St. Rep. 116.

WASSERBOEHR v. BOULIER.

[84 MAINE, 165.]

CONFLICT OF LAWS. — A CONTRACT VALID WHERE MADE is generally valid elsewhere; but to this rule there is this exception, that no state or nation is bound to recognize or enforce contracts which are injurious to its own interests, or the welfare of its people, or which are in fraud or violation of its own laws.

CONFLICT OF LAWS — ILLEGAL SALES. — THE PRICE OF ARTICLES sold and delivered in a state where such sale is legal, if nothing remains to be done by the vendor to complete the transaction, can be recovered in a state where such sale is illegal.

SALE, WHERE DEEMED TO BE MADE. — If, in the state of the vendee's residence, a contract is made, to the effect that the vendor will ship certain property from another state in original packages, which the vendee, after receiving, shall have ten days to return, if, on examination, they shall prove not satisfactory, any sale resulting from such contract and shipment must be deemed to have been made in the state of the vendee's residence, because it is incomplete until delivery is made there, and he has had an opportunity to examine the property and to elect whether he will keep it or not.

INTERSTATE COMMERCE. — SALE OF LIQUORS IS NOT IN THE ORIGINAL PACKAGES when the purchaser retains the right to examine the liquors in such packages and to return them if not satisfactory, because, under such circumstances, the sale cannot be completed until the packages are broken and the liquors sampled.

C. A. Cushman, for the plaintiff.

P. H. Gillin, for the defendant.

FOSTER, J. The plaintiff, a wholesale liquor dealer, residing in Boston, seeks to recover a balance of \$241.55 for intoxicating liquors sold the defendant upon an order given to the plaintiff's agent or traveling salesman, at the defendant's shop, in Old Town, in this state. The contract with the agent was, that the plaintiff should send the defendant five barrels of whisky and one barrel of port wine in original packages, and that the defendant was to have ten days after receiving

the goods in which to return them if they were not satisfactory. The plaintiff filled the order and shipped the liquors to the defendant. A part of them were returned.

We do not think the plaintiff is entitled to recover, for reasons which we shall state.

It is contended on the part of the plaintiff that the delivery of the liquors, which had been ordered by the defendant, to a common carrier in Boston, the plaintiff being duly licensed to sell at wholesale, for transportation to the defendant, was in law a delivery to him there, and that this delivery was a completion of the sale in Massachusetts, and that the sale being valid by the laws of that state, the defendant is liable for their value.

The first question to be considered is, whether the sale was made in Maine or Massachusetts. The validity of the sale may depend upon the decision of this question; for it is a general principle of law that the validity of a contract is to be decided by the law of the place where it was made, unless, either expressly or impliedly, it appears that it is to be performed elsewhere. And it is also an established principle, that if valid by the law of the place where made, it is generally valid everywhere; and if, in the jurisdiction where made, the law would enforce it, it will be enforced in the jurisdiction to which a party may be compelled to resort for a remedy for its violation. But to this rule there is this exception, that no state or nation is bound to recognize or enforce contracts which are injurious to its own interests, or the welfare of its people, or which are in fraud or violation of its own laws: *Bancher v. Mansel*, 47 Me. 58, 60; *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205.

It was in accordance with these general principles that the courts have held that the price of liquors sold and delivered in a state where such sale is legal, and nothing remains to be done by the vendor to complete the transaction, can be recovered in another state, where such sale would be illegal: *Torrey v. Corliss*, 38 Me. 333; *Bancher v. Cilley*, 38 Me. 553; *Orcutt v. Nelson*, 1 Gray, 536; *McIntyre v. Parks*, 3 Met. 207; *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; *Scudder v. Union Nat. Bank*, 91 U. S. 406. Though it is otherwise if the contract contains any ingredient or participation on the part of the original vendor that the goods shall be illegally sold, or that he shall do any act, beyond the mere sale, to assist or

facilitate the illegal act, or to aid the purchaser in his unlawful design in the subsequent unlawful disposition of the goods, or if the goods are to be delivered in the place where the sale is prohibited: *Smith v. Godfrey*, 28 N. H. 379; 61 Am. Dec. 617; *Banchor v. Mansel*, 47 Me. 58; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205; *Lindsey v. Stone*, 123 Mass. 332; *Wilson v. Stratton*, 47 Me. 120, 126, 127. This principle is illustrated in the case of *Tyler v. Carlisle*, 79 Me. 210, 212, 1 Am. St. Rep. 301, which was an action to recover money lent, to be used for gambling purposes, and the distinction is there drawn between the mere loaning of money with a knowledge it is to be so used, and a loan made with the express understanding, intention, and purpose that it is to be used to gamble with.

But omitting all consideration of the question whether the original vendor had knowledge of the intended illegal disposition of the liquors by the vendee, or participated in assisting or facilitating the vendee in any unlawful acts in relation to them, we think the plaintiff cannot maintain his action, for other reasons.

1. The sale was not made in Massachusetts, notwithstanding the order was filled in Boston and delivery there made to a common carrier. It became a completed contract after the arrival of the goods at their place of destination in Maine. The sale was conditional. The defendant was to have ten days in which to test the liquors, and if not satisfactory, to return them. And in such case it has been held that the sale is not complete until after the delivery is made and the purchaser has had an opportunity to make his election.

Thus in *Wilson v. Stratton*, 47 Me. 120, the contract was for intoxicating liquors between a vendor in Massachusetts and a purchaser in this state, in which it was stipulated that, after the goods were delivered here, the purchaser need not pay for them unless they suited him; and the court held that the sale was not complete until after delivery was made in this state, and the purchaser had an opportunity to make his election. Mr. Justice Rice, in delivering the opinion of the court, says: "The contract in this case was conditional; upon a condition precedent. That condition could not, under the circumstances, be determined until the goods came to the defendant's hands. Until he had determined whether the liquors were just what he wanted in all respects, or had a reasonable opportunity to do so, the contract was incomplete: *Crane v. Roberts*, 5 Me. 419; *McCarren v. McNulty*, 7 Gray, 139; *Grout v. Hill*, 4 Gray,

361." See also *Ballantynes v. Appleton*, 82 Me. 570, where the general rule is given, that where the buyer is, by the terms of the contract, bound to do anything as a condition, either precedent or concurrent, on which the passing the title depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer: *Hotchkiss v. Hunt*, 49 Me. 213; *Suit v. Woodhall*, 113 Mass. 391; *Weil v. Golden*, 141 Mass. 364; *Webber v. Doran*, 70 Me. 140.

2. Nor can the contract be upheld as being a sale of liquors in original packages. The contract, being conditional, with the right in the purchaser of ten days in which to ascertain whether the liquors were satisfactory or not, and if not, to return them, must be construed as giving the purchaser the right of breaking and examining the packages. The sale was not only conditional, but was executory and incomplete until the defendant had received, unsealed, and sampled the goods. That moment the sale was illegal by the laws of this state, and subjected the vendor to the penalties provided for the illegal sale of intoxicating liquors. He had no more right to complete the sale from such packages, or to sell from the packages after they were once unsealed or broken, than any other liquor-seller, and neither the constitution of the United States nor any decision of the courts can afford protection to him and shield his acts from the penalty for offenders against the laws of our own state. No importer, even under the constitution and decisions of the courts, is guaranteed the right of opening original packages which he may be allowed to import, and selling the contents of such packages either in gross or by piecemeal. His right extends only to selling in the original packages. This is the doctrine enunciated not only by our own court in *State v. Robinson*, 49 Me. 285, *State v. Blackwell*, 65 Me. 556, and *State v. Burns*, 82 Me. 558, 568, but also by the supreme court of the United States in *Leisy v. Hardin*, 185 U. S. 100.

Plaintiff nonsuit.

CONFLICT OF LAWS — LEX LOCI CONTRACTUS. — Validity and obligation of contract, and capacity of parties thereto, are to be determined by the *lex loci contractus*, unless there be something in the contract which is deemed hurtful to the good morals or injurious to the rights of its own citizens by the laws of the state or country whose courts are called upon to enforce the contract made in a foreign state or country: *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23;

Forepaugh v. Delaware etc. R. R. Co., 128 Pa. St. 217; 15 Am. St. Rep. 672.

PLACE WHERE SALE IS DEEMED TO BE COMPLETE: See, generally, note to *Ford v. Buckeye State Ins. Co.*, 99 Am. Dec. 670, where several cases are cited, involving, like the principal case, the question of a violation of the liquor laws. See also the note to *Commonwealth v. Fleming*, 17 Am. St. Rep. 773, as to when a sale of liquors sent C. O. D. is held to be consummated. In *Tredway v. Riley*, 32 Neb. 495, 29 Am. St. Rep. 447, and note, the same question is considered in connection with provisions of the interstate commerce act. Expressed in the most general terms, the rule for determining when the title to chattels sold passes is, that the sale is complete as soon as both parties have agreed to its terms: *Shaddon v. Knott*, 2 Swan, 358; 58 Am. Dec. 63. Therefore, a conditional sale and delivery passes no title until the condition is performed: *Sargent v. Metcalf*, 5 Gray, 306; 66 Am. Dec. 368; *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 119; *Bailey v. Harris*, 8 Iowa, 331; 74 Am. Dec. 312. Thus where the terms of a sale of goods are that the buyer is to give notes for the price, but after the goods are delivered to him the buyer refuses to give the notes, there is only an agreement to sell which is not perfected: *Millhiser v. Erdmann*, 103 N. C. 27. So where there is a shipment of machinery to a purchaser, with the understanding that he is to test the machinery, and if it is found satisfactory, to pay part of the price in cash, and execute his notes for the rest, and the purchaser refuses to test the machinery, and fails to make the cash payment, there is no executed contract of sale, although the property has reached the purchaser: *Hall & Brown Mfg. Co. v. Brown*, 82 Tex. 469. So where goods are received merely for examination, there is no acceptance: See cases cited in the note to *Shindler v. Houston*, 49 Am. Dec. 329. Compare *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831.

FINN v. FRINK.

[84 MAINE, 261.]

MALICIOUS PROSECUTION — EVIDENCE. — In an action for malicious prosecution for blackmail in sending a letter to the defendant, threatening him, as a physician, with an action for malpractice while treating the plaintiff, the defendant is not entitled, as evidence of probable cause, to introduce testimony tending to prove that his treatment of the plaintiff was professionally correct and skillful.

MALICIOUS PROSECUTION. — The fact that the complaint against defendant charged no legal offense does not constitute any defense to an action for malicious prosecution, if such complaint was an effort to charge a felony, and the accused was arrested and tried in the same manner he would have been if a strictly legal proceeding had been instituted.

MALICIOUS PROSECUTION — PROBABLE CAUSE. — COUNSEL AND ADVISOR OF A TRIAL JUSTICE in favor of the institution of a criminal prosecution, given upon a full and fair statement of the facts by the complainant, cannot exonerate him from responsibility as would the advice of a counselor of law under the same circumstances.

Wiswell, King, and Peters, for the plaintiff.

W. H. Fogler, and Deasy and Higgins, for the defendant.

PETERS, C. J. It appears from the testimony that in April, 1889, the plaintiff received an injury upon his eyes through a premature explosion of rock in a granite quarry; that he first came under the professional treatment of the defendant, a practicing physician and surgeon; that he afterwards visited an eye and ear infirmary in Portland, receiving treatment there; and that the final result to him was total blindness.

Or December 3, 1889, he sent the defendant this communication: —

“DR. FRINK.

“*Dear Sir*, — I will drop you a few lines to let you know through your co-treatment of my case I have lost the use of my eyes by not having the rock taken out of them in the first of my blowing up. The rock was not taken out until I got to the hospitale then my eye all ran out. You had me on the island and ran up a big bill. I heard you charged me \$26 for what time I was there and did not help me any. I have a chance to sue you for damages. I have seen a lawyer and so I notify you, if I don't receive an answer soon. I would like an answer as soon as possible.

“And oblige,

TIMOTHY FINN,

“East Surry, Maine.”

On the seventh day of the same month, the defendant procured a warrant against the plaintiff, signed by Trial Justice P. H. Mills, in pursurance of a complaint, signed and sworn to by the defendant, the charge in which is as follows: —

“Edward A. Frink, of Deer Isle, in the county of Hancock and state of Maine, in behalf of said state, on oath, complains that Timothy Finn, of East Surry, in the county of Hancock, state of Maine, did, on the third day of December, A. D. 1889, write over his own signature a certain libelous, slanderous, threatening letter directed to Dr. Frink, of Deer Isle, in said county, for the purpose of extorting money from the said complainant, which letter came duly into the hands of the said complainant through the United States mail, as he affirms, for the purpose of blackmail, against the peace of the state, and contrary to the form of the statute in such case made and provided.”

The case was tried before Trial Justice S. G. Haskell, who

quashed the complaint as defective. Thereupon a new complaint was sworn to before the last-named justice, made in stricter form, setting out the letter in full, and alleging an attempt by the letter to extort money as blackmail. On a warrant issued on this complaint, the plaintiff was arrested, carried before a third trial justice, tried on a plea of not guilty, and discharged.

Soon afterwards the plaintiff brought the present action for malicious prosecution, and in the trial of the action several questions arose, which are presented to us by the defendant's bill of exceptions.

As affecting the question of probable cause, the defendant offered to show, but was not permitted to do so, that his treatment of the plaintiff's injury was professionally correct and skillful. This ruling was right. There was no issue calling for such evidence, nor any assertion or presumption that the treatment was not skillful. The introduction of such evidence would have diverted the attention of the jury from the true issue, and possibly brought into the trial a protracted and useless collateral controversy. To be sure, the plaintiff's opinion of the treatment is implied by his letter, and the opinion of the defendant is implied by his conduct, — a matter of opinion against opinion merely.

The defendant contended at the trial that there could be no recovery against him on the count in the declaration which alleges a malicious prosecution by means of the first complaint against the plaintiff, because that complaint charges no legal offense. The same objection was urged at the argument in this court against all the counts in the writ. The idea of the defense is, that an insufficient complaint is no complaint, an illegal prosecution no prosecution. The first complaint affirms that a libelous letter was sent to the complainant for the purpose of extorting money by blackmail. It undertook to charge a felony. The plaintiff was arrested and tried in the same manner he would have been if a strictly legal proceeding had been instituted. In a technical sense, no crime was charged, but one was sufficiently stated to entitle the proceedings to be called a prosecution. It was deemed sufficient by the complainant and the magistrate, and would have seemed to be so, perhaps, to most men. It was hurtful to the plaintiff in the extreme. It was none the less a prosecution because defended on the law and not on the fact. The defendant is estopped to deny that it was a legal prosecution,

excepting so far as its illegality may affect the question of damages. The reason of the thing is so strong we do not feel it necessary to invoke the aid of any authorities on the question.

The counsel for defendant requested the judge presiding to instruct the jury that "if the defendant, in applying to the trial justices for the warrants against the plaintiff, made to the justices true statements of the facts of the case, this action cannot be maintained." The only fact in the case to be submitted to the trial justices was the reception of the letter. If no more than that had been done, there would be no cause of action against the defendant. It is not generally actionable to tell the truth. If it were so, witnesses would not be protected for their testimony anywhere. This principle lies at the foundation of many of the cases cited for the defense, to the effect that a person who testifies truly before a magistrate, grand jury, or court cannot be held answerable for what others do upon the strength of his testimony.

But the defendant did more than merely to report the letter to the magistrate. He signed and made oath to the complaint. That was his own responsibility. The magistrate could not require him to do so, nor do the act in his behalf. The most the magistrate could do for him would be to advise that a complaint be made. The requested instruction, if taken literally, was properly refused, because the facts confessedly did not support it.

If, however, it was sought, as we have no doubt it was, to obtain a ruling from the court, that counsel and advice from a trial justice in favor of the institution of a criminal prosecution, given upon a full, fair, and truthful statement of the facts by the complainant, would exonerate a complainant from responsibility to the same extent and with the same effect as would follow had the advice been given by a counselor at law under the same circumstances, then, too, the ruling was right. Magistrates are not counselors. It is not a privileged duty of magistrates to advise. We know that trial justices are not learned in the law, nor safe advisers on important legal questions. Of this there can be no better evidence than these very complaints and warrants which are the foundation of this case; and, still, the persons who acted as magistrates in these proceedings are known to the court as intelligent and influential men in the community where they live.

Two things are to be investigated preliminarily to the com-

mencement of a criminal prosecution: the facts and the law. Probable cause depends upon both. A complainant may know the facts, but not the law. He may obtain advice upon the latter of one learned in the law, and be protected though a mistake be made by the legal adviser. If a complainant sees fit to proceed without advice from such a source, he assumes the responsibility himself. We think it would be injudicious to allow any extension of the doctrine that legal advice under certain conditions may constitute probable cause or excuse the want of it. The tendency is rather in the opposite direction: See *Olmstead v. Partridge*, 16 Gray, 381.

Exceptions overruled.

MALICIOUS PROSECUTION ON NON-CRIMINAL CHARGE. — The arrest and imprisonment of a person on a charge which does not constitute a crime is not a cause of action for malicious prosecution: *Krause v. Spiegel*, 94 Cal. 370; 28 Am. St. Rep. 137, and note. An action for malicious prosecution cannot be sustained, where, because of a fatal defect in the warrant, the alleged prosecution had no legal existence: *Cockfield v. Brareboy*, 2 McMull. 270; 39 Am. Dec. 123. See note to *Antcliff v. June*, 21 Am. St. Rep. 546, as to what is necessary to sustain an action for malicious prosecution. See also note to *Ross v. Hixon*, 26 Am. St. Rep. 128.

MALICIOUS PROSECUTION — PROBABLE CAUSE — ADVICE OF MAGISTRATE. — If the prosecutor, before instituting a prosecution, fully and fairly stated the facts and circumstances to a justice of the peace, and was advised by him that they constituted a reasonable cause for the arrest of the plaintiff, and he acted in good faith under such advice; it has been held that no action can be sustained for the prosecution: *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. 174; but this is clearly contrary to the weight of authority on the subject: See note to *Ross v. Hixon*, 26 Am. St. Rep. 146. The finding of a committing magistrate that an offense has been committed, and that there is probable cause to believe that the defendant is guilty thereof, is only *prima facie* evidence of probable cause, in an action for malicious prosecution brought by such defendant against the complaining witness: *Ross v. Hixon*, 46 Kan. 550; 26 Am. St. Rep. 123, and note 146. See also *Conney v. Chase*, 81 Mich. 203, in which this subject is discussed, and in which an instruction to the jury that they might take into account whether the defendant paid the magistrate, who was also a lawyer, for his advice as counsel was held correct.

BRECKENRIDGE v. LEWIS.

[84 MAINE, 849.]

ESTOPPEL. — ONE WHO SIGNS A PAPER IN BLANK, AND INTRUSTS IT TO HIS AGENT for commercial purposes, gives him apparent authority to use it, and is therefore bound by a promissory note which the agent writes over such signature, though what the principal intended should be written was an order on a savings bank in which he had funds.

NEGOTIABLE INSTRUMENTS. — AN ACCOMMODATION INDORSEE of a promissory note who, after it is dishonored, takes it up or otherwise acquires title to it holds it with the same rights as were held by the original payee, and cannot, on the ground that it was partly paid by the discharge of his own demand to the holder of the note, be affected by any equitable defense which could not have been asserted against the latter.

NEGOTIABLE INSTRUMENTS. — NOTICE OF FRAUD in the origin of a negotiable instrument is not inferable from negligence on the part of the holder, nor because facts existed which ought to have put him, as a prudent man, on his guard.

ACTION on a promissory note purporting to be made by Mary A. Lewis and witnessed by her daughter, payable to the order of John S. Morse and indorsed by the latter, and also by the plaintiff, Breckenridge. The defendant contended that the note was a forgery, and was written over her signature, by Morse, without her knowledge or authority. Part of the evidence on behalf of plaintiff tended to show that the note was given by the defendant to Morse in settlement of an account, but this evidence was contradicted by witnesses on the part of the defendant. Morse had acted as agent of the defendant, and the evidence tended to show that she had intrusted him with blank pieces of paper, signed by her and witnessed by her daughter, to enable him to draw money from a savings bank; that he presented to plaintiff the note in suit, and requested him to get it discounted to provide funds with which to pay drafts which defendant might draw on him while in Europe; that plaintiff was unable to procure any one to discount the note until he also wrote his name on the back as indorsee; that he finally indorsed it without any compensation, and to enable Morse to obtain money from one Francis; that after the note became due, plaintiff paid Francis the amount thereof, first deducting an indebtedness due to him from Francis. The defendant requested instructions to the jury to the effect that if Morse filled in the blank paper bearing the signature of the defendant, and given to him to draw money from the savings bank, by writing over such signature the note sued upon without the knowledge or consent of the

defendant, and without her fault, plaintiff could not recover, and that if plaintiff indorsed the note for the benefit of Morse, and not of defendant, and did not pay it until three months after it fell due, he was not a *bona fide* purchaser, and the defense might be made against him that the note was obtained by fraud and without consideration. Both requests were refused. Verdict and judgment for the plaintiff.

F. V. Chase, for the plaintiff.

Edward Avery and A. A. Strout, for the defendant.

HASKELL, J. The plaintiff indorsed the defendant's promissory note for the accommodation of one Morse, the payee, who then negotiated the same, and, when it fell due, the plaintiff paid it, and now sues to recover the amount of the note from the defendant.

1. The signature of defendant to the note was claimed to be a forgery. The court ruled that a defense.

2. The note was claimed to have been fraudulently written by the payee, Morse, over the defendant's name, signed on blank paper, to enable Morse to write an order on a savings bank, where defendant had funds, as the necessities of her business intrusted to Morse might require; and the court ruled that contention no defense.

It is contended that defendant's negligence in the premises should have been submitted to the jury; but that was not necessary, inasmuch as the question of negligence, as matter of fact, need not be considered an element, required to charge the defendant under the facts of this case. The payee of the note, Morse, was intrusted with defendant's name in blank, to draw funds necessary to meet the calls of her business, intrusted to the care of her agent, Morse. He was authorized to write an order above defendant's signature, but instead of so doing, he wrote a promissory note, and obtained the amount of it from a stranger. He fraudulently used his apparent authority for his own gain instead of his principal's. His relation to his principal is the same as if he had procured the money on an order that he was authorized to write, and then embezzled it. The defendant may be held under the plain rules of agency. By intrusting her signature to her agent for use, the defendant gave him an apparent authority to use it in the manner he did. The limited authority, only known to themselves, cannot be held to reach strangers, who neither knew nor had

means of knowing of that secret limitation. The note, when presented for discount, gave no suggestion of infirmity. The signature was genuine, and, apparently, the payee, defendant's agent, who indorsed it, had authority to negotiate it. It was apparently the defendant's genuine promise, and she, by intrusting her name to her agent for commercial purposes, held him out as an agent with general powers in relation to it. She clothed him with apparent authority, and cannot now deny it, to the loss of any person who innocently relied upon it. It is better that she bear the consequences of misplaced confidence, than that an equally innocent person shall suffer. She selected the agent; the plaintiff did not. The apparent authority of the agent makes his act her own, in this case, as effectually as if her authority had been real. That is the doctrine of *Young v. Grote*, 4 Bing. 253, and of *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206, cited with approval in *Wade v. Withington*, 1 Allen, 562, and in *Greenfield Sav. Bank v. Stowell*, 123 Mass. 198, 199, 25 Am. Rep. 67, where all the cases, both English and American, are reviewed. See also *Redlon v. Churchill*, 73 Me. 146; 40 Am. Rep. 345.

The same doctrine is held in *Earl of Sheffield's Case*, L. R. 13 App. C. 333 (1888). The earl authorized his agent to procure a loan for a limited amount, and transferred to him in blank certain stocks, and delivered to him certain bonds for the purpose. The agent procured the loan, and delivered the securities to a broker, who in turn pledged them for his entire indebtedness to certain banks. The earl sought to redeem; but the banks (the broker being insolvent) refused him, relying upon their legal title to the securities. At the first trial, redemption was denied, upon the ground that the agent was master of the stocks, and had actual authority to convey them. On appeal, it was held that the agent had not actual authority to dispose of the stocks as he pleased; that his actual authority was limited to the amount of the loan authorized, but that the banks became owners of the stocks and bonds, having acquired the legal title, without notice of infirmity, through an agent who apparently had full authority to give it. On final appeal, the lords approved the doctrine of the court of appeals, that if the banks, as purchasers of the stocks, took the legal title from an agent having apparent authority to give it, without notice of his actual limited authority, such title would become absolute, but reversed the judgment of the court of appeals, for the reason that the banks had actual no-

tice of the limited authority of the broker over the stocks, and allowed the earl to redeem. See also *Colonial Bank v. Cady*, L. R. 15 App. C. 267.

It is the same doctrine held where the signature is placed to a blank instrument to be filled by the person intrusted with it, only the blank is a patent limitation of the agent's authority. He may fill the blank as may suit him best, and the principal will be held. The blank form carries with it an implied authority to complete it, but not to alter it: *Russell v. Langstaffe*, 2 Doug. 514; *Violet v. Patton*, 5 Cranch, 142; *Bank of Pittsburgh v. Neal*, 22 How. 96; *Androscoggin Bank v. Kimball*, 10 Cush. 373; *Angle v. Northwestern M. L. Ins. Co.*, 92 U. S. 330; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; approved in *Kellogg v. Curtis*, 65 Me. 61.

8. It is denied that the plaintiff is a *bona fide* holder of the note, so that equitable defenses must be shut out. That question was submitted to the jury under instructions, in substance:—

a. If plaintiff wrote his name upon the note, before maturity, under the name of the payee, and for his accommodation, without notice of any infirmity in the note, and paid the same in the hands of an innocent holder at maturity, he may recover of the defendant the contents of the note, even if the plaintiff paid the note partly by the discharge of his own debt to the holder, and partly by his own note given for the balance.

When the plaintiff indorsed the note for the accommodation of the payee, he became liable thereon, subject to mercantile usage, and held the same relation to the maker as if he had discounted the note himself, instead of indorsing it. The payee received the money on the note from the holder, to whom the plaintiff became contingently liable for its payment; and when the plaintiff became absolutely liable to pay the note, and did pay it, the promise of the maker, negotiable in form, transferred by the payee's indorsement, ran to him; and it could make no difference to the maker by what means or for what consideration the plaintiff gained title to the note. He then held it with the same rights in regard to it as if he had given the payee the money on the note, instead of an accommodation indorsement, that afterwards compelled the payment of money, or an equivalent agreed to between him and the holder, to whom it had been negotiated: *Green v. Jackson*, 15 Me. 136; *Eaton v. McKown*, 84 Me. 510; *Roberts v. Lane*, 64 Me. 108; 18 Am. Rep. 242; *Barker v. Parker*, 10 Gray, 339. "A pre-

existing debt constitutes a valuable consideration in the transfer of negotiable paper": *Lee v. Kimball*, 45 Me. 174; *Norton v. Waite*, 20 Me. 175; *Homes v. Smyth*, 16 Me. 177; 33 Am. Dec. 650; *Swift v. Tyson*, 16 Pet. 1; *Blanchard v. Stevens*, 3 Cush. 162; 50 Am. Dec. 723. By his indorsement, the plaintiff engaged that the note should be paid according to its tenor. He engaged that it was genuine, and the legal obligation that it purported to be: *Furgerson v. Staples*, 82 Me. 159; 17 Am. St. Rep. 470; and it would be absurd to say that when he met his indorsement to the satisfaction of the holder, he could not sue the maker.

b. It is a question of fact whether the plaintiff, when he took the note, had knowledge of its fraudulent origin. "Mere negligence on his part is not sufficient to show it; nor is it sufficient if the facts are simply enough to put a prudent man on his guard. It must appear that the plaintiff had knowledge of the fraudulent inception of the note."

Exception to this instruction is not pressed by briefs of counsel. It seems to be in accord with the rule laid down in *Farrell v. Lovett*, 68 Me. 326, 28 Am. Rep. 59, and approved in *Kellogg v. Curtis*, 69 Me. 212; 31 Am. Rep. 273. Applying this rule to the evidence, it cannot be said that the plaintiff had knowledge of the fraudulent inception of the note.

Motion and exceptions overruled.

NOTES EXECUTED IN BLANK: See note to *Spiller v. James*, 2 Am. Rep. 340. The rule is, that a party who signs a blank paper makes the holder his agent, since the blank signature operates as a general letter of credit, which authorizes any party to whom it was intrusted to fill it up as he chooses: *Davis v. Lee*, 26 Miss. 505; 59 Am. Dec. 267, and note; compare *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; and note to *Bedell v. Herring*, 11 Am. St. Rep. 316. As to the liability which may arise from leaving blanks in commercial paper which permit fraudulent alterations to be made, see *Fordyce v. Kosminski*, 4 Am. St. Rep. 25, 26, and note; *Burrows v. Klunk*, 70 Md. 451; 14 Am. St. Rep. 371. But although the indorsing or signing of a blank note or draft, and intrusting it to another that he may raise money on it, authorizes him to fill any and all blanks that are necessary and proper to make the instrument a perfect and complete promissory note or bill of exchange, it will not authorize insertion of clause wholly unnecessary for the purpose: *Holland v. Hatch*, 11 Ind. 497; 71 Am. Dec. 363.

NEGOTIABLE INSTRUMENTS. — One who takes negotiable paper before maturity, without notice, and in absolute payment of an antecedent debt, is regarded as a *bona fide* purchaser, entitled to enforce payment, without regard to the defenses that may exist between other parties to the paper: *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454; 3 Am. St. Rep. 241; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375. *Contra* in Mississippi: See *First Nat. Bank v. Strauss*, 66 Miss. 479; 14 Am. St. Rep. 579.

NEGOTIABLE INSTRUMENTS — FRAUD, NOTICE OF. — The law looks with favor upon the holder of negotiable paper, and requires very cogent evidence to convict him of bad faith: *New Orleans etc. Co. v. Templeton*, 20 La. Ann. 141; 96 Am. Dec. 385. Nothing short of actual bad faith or notice thereof will enable the maker or indorser of negotiable paper to defeat an action thereon, brought by one who is apparently a regular indorsee or holder: *City Bank v. Perkins*, 29 N. Y. 554; 86 Am. Dec. 332. The question of fraud or bad faith on part of holder of note is to be determined from all the facts attending its purchase by him, without reference to the supposed or assumed conduct of others if situated as he was: *Williams v. Huntington*, 68 Md. 590; 6 Am. St. Rep. 477. It is not enough to defeat the recovery of a *bona fide* holder, to show that he took it under circumstances that might tend to excite suspicion: *Farrell v. Lovett*, 68 Me. 326; 28 Am. Rep. 59. In New York the rule is settled that when the maker of a negotiable note shows that it has been obtained from him by fraud or duress, a subsequent holder, before he can recover on it, must show that he is a *bona fide* holder, and he does not satisfy this requirement by showing that he paid value for the note, but must go further, and show that he had no knowledge or notice of the fraud with which the instrument was tainted from its origin: *Vosburgh v. Diefsendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836.

MANN v. JACKSON.

[84 MAINE, 400.]

MARRIAGE, CONDITIONS IN RESTRAINT OF. — There is a distinction between conditions in restraint of marriage annexed to testamentary dispositions, and restraints on marriage contained in the very terms of the limitation of the estate given.

MARRIAGE, RESTRAINT OF. — A DEVISE of his home to the testator's daughter for her natural life, unless she shall be married, in which case her life estate shall cease, if the apparent purpose of the will appears not to be to restrain her from marriage, but merely to give her the use of a house until, from her marriage, she will probably have a home otherwise provided for her, is not against public policy, and on the marriage of the daughter, her life estate terminates.

A. W. Paine, for the plaintiffs.

C. H. Bartlett, for the defendant.

WHITEHOUSE, J. This is a bill in equity, brought for the purpose of obtaining a judicial construction of the following will: "1. I will that the money which may come from the policy of insurance which I hold on my own life be appropriated to the payment and discharge of any and all mortgages then existing on my homestead house and lot on Cedar Street, in said Bangor, so that said homestead may be free from all encumbrances, and any balance to be applied to pay any taxes

then due or unpaid on said homestead, and any balance to go with my other estate. 2. My said homestead house and lot aforesaid I give and devise to my unmarried daughter, Helen S. Mann, for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried, she is to have the exclusive right of occupation, use, and enjoyment of said homestead, but subject to the duty of keeping it in good repair at her expense, and paying all taxes and keeping the property well insured. If all parties interested see fit to sell the property, they may do so, in which case said Helen is to receive the net income from the proceeds of sale, the same to be well invested for that purpose, and if the buildings are burned in whole or part, the insurance money shall be applied to repair or rebuild, unless all agree to a different appropriation of the money, viz., all parties interested. 3. All other estate, real and personal, of all kinds which I may own or possess at death, including the remainder of my homestead, house and lot aforesaid, my farm on the Odlin road, so called, and all other property, I give in equal shares to my three children, William E. Mann, Mrs. Augusta S. Harden, and Helen S. Mann, to have and to hold the same to them and their heirs and assigns forever."

After the death of the testator, Helen S. Mann married, and is the defendant in this suit.

The language of the second item of the will is specially brought in question. The plaintiff says that the defendant's "life estate" in the homestead was terminated by her marriage, while the defendant contends that the clause limiting her exclusive title by her marriage is void as being a condition in restraint of marriage, and that she is entitled to the sole use and occupation of the homestead during her natural life.

It is undoubtedly an established rule of law that, even with respect to devises of real estate, a subsequent condition which is intended to operate in general and unqualified restraint of marriage, or the natural effect of which is to create undue restraint upon marriage and promote celibacy, must be held illegal and void, as contrary to the principles of sound public policy. It appears from the early English cases that this doctrine was borrowed by the English ecclesiastical courts from the Roman civil law, which declared absolutely void all conditions in wills restraining marriage, whether prece-

dent or subsequent, whether there was any gift over or not. But the courts of equity found themselves greatly embarrassed between their anxiety, on the one hand, to follow the ecclesiastical courts, and their desire, on the other, to give more heed to the plain intention and wish of the testator as manifested by the whole will. Thereupon the process of distinguishing commenced for the purpose of preventing obvious hardships arising from the application of that technical rule to particular cases. As a result there has been ingrafted upon the doctrine a multitude of curious refinements and subtle distinctions respecting real and personal estate, conditions and limitations, conditions precedent and conditions subsequent, gifts with and without valid limitations over, and the application of the rule to widows and other persons. Indeed, it may be said of the decisions upon this subject with even more propriety than was observed by Lord Mansfield in regard to another branch of law, that "the more we read, unless we are very careful to distinguish, the more we shall be confounded." The whole subject as to what conditions in restraint of marriage shall be regarded as valid and what as void would seem to be involved in great uncertainty and confusion, both in England and in this country. There is clearly discernible, however, through all the decisions of later times, an anxiety on the part of the judges to limit as much as possible the rule adopted from the civil law. "The true rule upon the subject is," says Mr. Redfield, "that one who has an interest in the future marriage and settlement of a person in life may annex any reasonable condition to the bequest of property to such person, although it may operate to delay or restrict the formation of the marriage relation, and so be in some respect in restraint of marriage. . . . Where there are hundreds of conflicting cases upon a point, and no general principle running through them by which they can be arranged or classified, what better can be done than to abandon them all, and fall back upon the reason and good sense of the question, as the courts have of late attempted to do?" 2 Redfield on Wills, p. 290, sec. 20, and note. See also 2 Redfield on Wills, 297, and 2 Jarman on Wills, 569. Beyond the general proposition first stated, the cases seem finally to resolve themselves, for the most part, into the mere judgment of the court upon the circumstances of each particular case: 2 Redfield on Wills, p. 297, sec. 31; 2 Pomeroy's

Eq. Jur. 933; *Coppage v. Alexander's Heirs*, 2 B. Mon. 313; 38 Am. Dec. 153, and note.

But the rule was so far modified and relaxed that conditions annexed to devises and legacies restraining widows from marrying have almost uniformly been pronounced valid: 2 Pomeroy's Eq. Jur. 933. From the numerous decisions upon the subject in the United States, the conclusion is fairly to be drawn that such conditions will be upheld in the case of widows, whether there is a gift over or not: 2 Jarman on Wills, 563, note 29; 2 Redfield on Wills, 296; Schouler on Wills, 603. See also recent cases of *Knight v. Mahoney*, 152 Mass. 523, and *Nash v. Simpson*, 78 Me. 142.

In 2 Redfield on Wills, 296, the author says: "We apprehend there is no substantial reason, either in law or morals, why a man should be allowed to annex an unreasonable condition in restraint of marriage, one merely *in terrorem*, in case of a wife, more than of a child or any other person in regard to whose settlement in life he may fairly be allowed to take an interest; but the cases, certainly many of them, maintain such distinction."

It is unnecessary, however, to enter upon an elaborate discussion of the subject. The existence of the rule as recognized in *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281, is not here questioned. In that case the rule was applied to a "crude and ill-defined" proviso in a deed of real estate. We have no occasion to question the soundness of that decision. It was the judgment of the court upon a particular set of words in that deed. It is not an authority to control the judgment of the court respecting the construction of an entirely different set of words in a testamentary gift of real estate.

There is a recognized distinction between conditions in restraint of marriage annexed to testamentary dispositions and restraints on marriage contained in the very terms of the limitation of the estate given.

In *Heath v. Lewis*, 3 De Gex, M. & G. 954 (1853), a testator made a gift of thirty pounds a year to an unmarried woman during the term of her natural life, "if she shall so long remain unmarried." Lord Justice Knight-Bruce said: "It must be agreed on all hands that it is, by the English law, competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity would thereupon cease.

‘During the term of her natural life, if she so long remain unmarried,’ is the technical and proper language of limitation as distinguished from a condition.” Lord Justice Turner said: “It may either be a gift for life defeated by a condition, or it may be a gift to her so long as she remains unmarried,—that is, for life, if she be so long unmarried; and the question is therefore purely one of intention, in which of the two senses the words were used.”

Jones v. Jones, L. R. 1 Q. B. D. 279 (1876), is an important authority. It related to a devise of real estate, the testator’s language being as follows: “Provided said Mary remains in her present state of single woman; otherwise, if she binds herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed by the other parties mentioned.” Blackburn, J., said: “A number of cases have been referred to, from which it appears that the courts of equity have adopted from the ecclesiastical or civil law, it is unnecessary to say to what extent, the rule that conditions in general restraint of marriage are invalid. The attempt to escape from the consequences of this rule led to decisions in which a great many nice distinctions were established as to whether the bequest amounted to a condition or only a limitation. If this point had been as to a bequest of personal estate, it would have been necessary to look at these decisions. But this is a devise of land, which is governed by the rules of the common law, and it is admitted that there is no case which extends the rule as to conditions or limitations to devises of land. There is, I admit, strong authority that when the object of the will is to restrain marriage and promote celibacy, the courts will hold such a condition to be contrary to public policy and void. But here there appears to be no intention to promote celibacy. Now, here, I think, when one sees the scope of the testator’s dispositions, it comes to this: ‘I have left to three women enough to live upon, and if one of them dies, I bring in Jemima and Mary. But if Mary (I suppose, as the youngest, she was most likely to change her state) happens to marry, her husband must maintain her, and her share shall pass to the rest.’ Now, if he had said this in express words, could it have been contended that his provision was contrary to public policy? I think not. It is admitted that the limitation to Mary until she marries is perfectly good; but it is said that here, because the disposition is in the form of a condition, it is bad.” Lush, J., said: “We ought to take the words in such a sense as to

carry out the object of the testator, unless it is illegal; and as I read the words, the testator only meant to provide for her while she was unmarried. There is nothing in these words which compels us to think it was the testator's object that this niece should never marry at all; he probably supposed that she would be maintained by her husband, and did not mean to provide for husband and wife." See also *Holtz's Estate*, 38 Pa. St. 422; 80 Am. Dec. 490; *Conrell v. Lovett*, 35 Pa. St. 100; *Graydon v. Graydon*, 23 N. J. Eq. 230; *Courter v. Stagg*, 27 N. J. Eq. 305.

It is the enlightened policy of courts of equity, when not restrained by compulsory rules, to seek to discover the intention of the testator from the whole instrument, rather than from any particular form of words.

In the case before us, the testator makes careful provision in the first item of the will for the appropriation of so much of the proceeds of his life insurance as might be necessary to discharge all mortgages on the homestead. In the second item he devises the homestead to his unmarried daughter "for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried, she is to have the exclusive right of occupation, use, and enjoyment of said homestead." In case all parties interested agree to a sale of the property, this daughter is to receive the net income of the proceeds, "the same to be well invested for that purpose"; and in the event of the destruction of the buildings by fire, the insurance money shall be applied in rebuilding them. In the third item he gives the residue, including the remainder of his homestead, to his three children, in equal shares.

Here, then, is the case of a parent who has a recognized right, and was under a moral obligation, to interest himself in the settlement of his daughter. To the ordinary mind, untrammelled by the "mediævalism of the law," there is nothing in the will indicating any other thought or feeling than an affectionate regard for the welfare and happiness of a beloved daughter, and an anxious desire to provide for her a permanent and comfortable home. The modern court, free from the incubus of arbitrary legal dogmas, must fail to discover in the language of this will any suggestion of a purpose on the part of the father to impose a condition *in terrorem* in restraint of his daughter's marriage. It discloses no other disposition than a praiseworthy desire to secure to the daugh-

ter the continued occupation and enjoyment of the old homestead until, by reason of her marriage, she should cease to need it; then she was to share equally with her sister and brother in the entire estate. It is manifest from the whole tenor of the will that nothing was more remote from the real purpose of the testator than the idea of discouraging the marriage of this daughter. The intention was, not to promote celibacy, but simply to furnish support until other means should be provided. Because of the inadvertent use, by the scrivener, of the word "unless," this court is not compelled to impose upon this instrument an intention which it is manifest from the context the testator never had. There is no such inflexible rule; the rights of the parties are not to be determined by an application of such a procrustean method. The provision is in no respect *contra bonos mores*. It is not violative of any principle of sound policy. And if it is here necessary and proper to recognize and maintain the distinction between a limitation and a condition subsequent, the language of this will should be held to constitute a valid limitation, and not an illegal condition.

The defendant's exclusive right to the possession and enjoyment of the entire homestead ceased upon her marriage.

Decree accordingly.

MARRIAGE. — For a discussion of devises in restraint of marriage, what are valid and what are not, see note to *Hott's Estate*, 80 Am. Dec. 493; extended note to *Coppage v. Alexander*, 38 Am. Dec. 158, where the distinction as to conditions in restraint of marriage, where there is a limitation over after the particular estate, is discussed. See also note to *Parsons v. Winslow*, 4 Am. Dec. 114. A contract which provides for the payment of money upon the happening of an event therein specified, provided such event happens previous to the date of the second marriage of the obligor, is not a contract in restraint of marriage: *Shafer v. Senseman*, 125 Pa. St. 310.

RODICK v. BUNKER.

[84 MAINE, 441.]

INSOLVENCY — LEASES. — AN ASSIGNEE IN INSOLVENCY may elect to accept a lease in favor of the insolvent, but, in the absence of such election, he has no estate in the leased property. He may be required, within a reasonable time, at the instance of the insolvent, to elect whether or not he will accept the estate as lessee.

INSOLVENCY — LEASES. — A DISCHARGE in insolvency does not relieve a lessee from the payment of rent accruing subsequently to the assignment, in the absence of statutory provision to that effect.

E. S. Clark, for the plaintiff.

W. P. Foster, for the defendant.

LIBBEY, J. This is an action on a covenant in a lease of real estate for the payment of rent by the defendant. In defense he relies upon his discharge in insolvency by the court of insolvency of Hancock County from the payment of all his debts which existed on the eighth day of October, 1888, the day on which he was declared an insolvent, in accordance with the terms of chapter 70 of the Revised Statutes. The lease sued on was executed by the parties on the fourteenth day of July, 1888, for the term from the 13th of March, 1888, to the twenty-first day of February, 1892, for which the defendant covenanted to pay rent of two hundred dollars per year in two semi-annual payments of one hundred dollars each.

The plaintiff does not claim the rent that had accrued prior to the insolvency of the defendant; and the contention between the parties is, whether the defendant is liable to pay the rent which he covenanted to pay in the lease, subsequent to his insolvency. The defendant claims that his rights under the lease passed to the assignee in insolvency by the assignment executed by the judge of the court of insolvency, and that he had no estate under the lease after that assignment, and therefore he claims that he is not responsible for the payment of the rent.

As the case comes before the court, there is nothing that tends to show whether the assignee accepted the estate of the insolvent under the lease or had any control over it. It does not appear whether the defendant ceased to occupy after the assignment, or continued to occupy to the end of the lease. The assignment would convey the estate of the insolvent under the lease if the assignee elected to accept it. But until it is shown that he did elect to accept it, it does not appear that he has any estate under it. The insolvent may require him to elect within a reasonable time whether he will accept his estate as lessee or not; and if he does not accept it within a reasonable time, the insolvent may continue to occupy under it as if there had been no assignment made. This is the doctrine of the English courts under their bankruptcy act, as determined in *Mills v. Auriol*, 1 H. Black. 433; 4 Term Rep. 94. The case is also found in 1 Smith's Lead. Cas., 7th ed.,

pt. 2, 1227, with notes by Hare and Wallace, collecting the American decisions upon the same subject.

The English rule as determined by the courts of that country goes further, and holds that the assignment does not relieve the lessee from the payment of rent accruing subsequent to the assignment, without some additional statutory provision or covenant in the lease. We understand the rule as determined by the courts in this country under the bankruptcy act of 1867 is to the same effect: *Treadwell v. Marden*, 123 Mass. 390; 25 Am. Rep. 108.

The provisions of chapter 70 of our statutes involved in the determination of this question are as follows:—

“Sec. 46. A discharge in insolvency duly granted shall, subject to the limitations in the two preceding sections [which are not important here], within this state, release the insolvent from all debts, claims, liabilities, and demands which were or might have been proved against his estate in insolvency.”

“Sec. 25. All debts due and payable from the debtor at the time of the filing of the petition by or against him, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the insolvent. . . . In all cases of contingent debts and contingent liabilities contracted by the insolvent, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends if the contingency happens before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court orders, and he may prove for the amount so ascertained. . . . Where the insolvent is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the insolvency as if the same fell due from day to day, and not at such fixed and stated periods. No debts other than those specified in this section shall be proved or allowed against the estate.”

The claim in suit is not a contingent debt or contingent liability contracted by the insolvent: *Fernald v. Johnson*, 71 Me. 437; but it falls under the last section of the clause quoted. It is very clear, then, that no claim for the rent covenanted to be paid under the lease in suit could have been proved against the insolvent's estate, which had not accrued at the time of

the insolvency. True, the case of *Treadwell v. Marden*, 123 Mass. 390, 25 Am. Rep. 108, before cited, arose under the bankruptcy act of the United States of 1867; but the provisions of our statute before quoted are the same in substance, if not in precise words, that are found in that act. And we think the same construction should be put upon our statute, in determining the question before us, as is found in *Treadwell v. Marden*, 123 Mass. 390; 25 Am. Rep. 108.

We think it follows, then, that the rent sued for, which accrued after the insolvency of the defendant, was not provable against his estate, and is therefore not barred by his discharge. The defendant must be defaulted for the rent from the date of his insolvency to the first day of August, 1890, with interest from the date of the writ.

INSOLVENCY — ASSIGNMENT OF LEASEHOLD INTEREST — VALIDITY OF. — A lessee's covenant not to lease, underlet, nor permit any person to occupy the premises without the lessor's permission affords no defense to the lessee in an action to recover the premises by one holding an assignment from the lessee's assignee appointed in voluntary insolvency proceedings: *Bemis v. Wilder*, 100 Mass. 446. A covenant for quiet enjoyment in a lease for years runs with the land, and will pass with it to any person, as assignee in law, who becomes legally possessed of the term: *Shelton v. Codman*, 3 Cush. 318; and in the same case it was held that a leasehold interest might be attached and sold on execution.

INSOLVENCY — LIABILITY OF INSOLVENT FOR RENT. — The property of an applicant for the benefit of the insolvent law is in the custody of the law for the benefit of creditors, and, while in such custody, cannot be distrained for rent: *Buckey v. Snouffer*, 10 Md. 149; 69 Am. Dec. 129, and note. A discharge in insolvency is a bar to an action against the insolvent for the recovery of money which became due after the discharge under a previous contract of hiring for a fixed term of years, as the contract creates a liability within the meaning of the insolvent act: *Mooney v. Detrick*, 85 Cal. 549. As to what demands may be discharged under state insolvent laws, see note to *Norton v. Cook*, 23 Am. Dec. 347-353. An assignee in insolvency does not become liable for the rent of the premises demised to his insolvent debtor, merely by accepting the trust and receiving a deed of assignment of the debtor's estate: *Hoyt v. Stoddard*, 2 Allen, 442.

ROCKLAND WATER COMPANY v. ADAMS.

[84 MAINE, 472.]

WATER COMPANIES. — A REGULATION OF A WATER COMPANY that one year's rent will be required in all cases, payable in advance, on the first day of July of each year, is not reasonable, and cannot be enforced, and therefore a year's rent cannot be collected of one who has used water a few months.

WATER COMPANIES. — CONTRACT TO PAY FOR WATER ACCORDING TO THE REGULATIONS OF A WATER COMPANY will not be implied from knowledge of such regulations if they are unreasonable, and cannot be enforced against persons not assenting thereto.

J. O. Robinson and J. F. Libby, for the plaintiff.

C. E. and A. S. Littlefield, for the defendant.

LIBBEY, J. This is *assumpsit* to recover for the alleged use of water furnished by the plaintiff corporation to the defendant in the city of Rockland from July 1, 1885, to July 1, 1886. It comes before this court upon an agreed statement of facts.

The defendant in fact took and used the water from the first day of July, 1885, to the fourth day of November, 1885, when he notified the plaintiff corporation that he had ceased taking and should use it no more. The plaintiff claims to recover for the whole year, on the ground that under its charter it had the power to establish regulations "for the use of said water, and establish, subject to the control of the legislature, the prices and rents to be paid therefor." The defendant had taken the water from the plaintiff for several years prior to 1885, for which he had paid at or near the beginning of each year, taking a receipted bill therefor containing, printed upon the back thereof, the regulations which it had established, by virtue of which it claims to recover for the full year in this case.

The regulations relied upon are Nos. 6 and 7. They read as follows:—

"Sec. 6. One year's rent will be required in all cases.

"Sec. 7. All water rates shall be payable at the office of the company one year in advance, on the first day of July in each year, and if not paid within ten days after the same are due, the water shall be shut off without further notice, and not let on again, except on the payment of two dollars."

The case does not show that there was any demand made by the plaintiff for the payment of the rent prior to the commencement of the suit. The contention between the parties

is, whether, in the absence of an express contract to pay for the whole year, the defendant can be held liable to pay for the whole year, when he in fact used the water for four months and four days only.

We think the result must depend upon the question whether the regulation adopted by the company, that one year's rent will be required in all cases, and shall be payable at the office of the company one year in advance, on the first day of July in each year, is a reasonable regulation by the company, which should bind the taker of the water to pay for a whole year if he wants to use it, and does use it for a third only of the year, as in this case. If this is a reasonable regulation, and was known by the defendant, it would bind him to pay in accordance with its terms. If it is not a reasonable regulation, then the defendant could not be bound by it; but to recover for the full year the plaintiff must prove a special agreement to pay for a year, whether the taker used the water for that time or not. The defendant cannot be held to have made a special contract to pay according to the regulations of the company relied on, merely by showing that he had knowledge of the regulation; but the plaintiff must show that he expressly assented to it and agreed to be bound by it: *Fillebrown v. Grand Trunk R'y Co.*, 55 Me. 468; 92 Am. Dec. 606; *Gott v. Dinsmore*, 111 Mass. 45, 52.

By its charter the plaintiff corporation was charged with the duty of supplying to all persons and corporations a reasonable amount of water, for the uses specified in the charter, on demand, for a reasonable compensation. It had the right to take the water from a large pond over which the legislature had jurisdiction. It had the right of eminent domain, the taking of lands for the laying of its main and pipes for the purpose of supplying water, and was charged with the corresponding duty to the public to furnish and supply the water on reasonable terms.

We do not think that a regulation providing that every taker of the water should be liable to pay rent for the whole year, whether he actually uses it for that length of time or not, and to make the payment in advance on the first day of July, without a special undertaking therefor, is reasonable. It casts upon the public, who have occasion to use the water for a short time only, an unjust and unreasonable burden. True, it is said that by the charter they have the power to establish, subject to the control of the legislature, the prices

and rents to be paid for the water, and that the legislature never has attempted to control this regulation. But we do not think that takes the power from the court, when called upon to adjudicate between the parties upon their legal rights. Then, if the regulation is unreasonable and must be declared void, so that no action can be maintained in this case upon the force of it, is there any ground upon which the plaintiff can recover for a longer period of time than that during which the defendant took and used the water? We think there is nothing in the case as presented which would authorize the court, in determining what is justly and equitably due, to charge the defendant for anything more than the value of the water during the time that he used it, which is \$6.61, with interest from the date of the writ.

Defendant defaulted.

WATER COMPANIES—RULES, WHEN REASONABLE.—A rule of a water company which provides that upon the non-payment, within a reasonable time, of the amount due by a party for water furnished him, the company may deprive him of the further use of its water by shutting off the supply until payment of the amount due, is reasonable and binding as against a party furnished with water under contract with actual notice of the rule, and its enforcement will not be enjoined: *Tacoma Hotel Co. v. Tacoma Land etc. Co.*, 3 Wash. 316; 28 Am. St. Rep. 35, and note.

WARREN v. PRESCOTT.

[81 MAINE, 433.]

AN ADOPTED CHILD TAKES A LEGACY given to one of its adopted parents, who dies before the testator, where the statute authorizing the adoption declares that the child becomes, to all intents and purposes, the child of its adopters, the same as if born to them in lawful wedlock.

Merrill and Coffin, for the plaintiff.

Walton and Walton, for Mary A. Prescott.

Heath and Tuell, for Alice P. Brick.

WALTON, J. The question is, whether an adopted child can take a legacy given to one of its adopting parents, and thus prevent the legacy from lapsing, when the legatee dies before the testator. There is no doubt that a child born in lawful wedlock can so take. But in this particular does an adopted child possess the same right? We think so. With two ex-

ceptions, neither of which is applicable to such a case, an adopted child becomes, "to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock." Such is the express language of our statute in relation to the adoption of children: Rev. Stats., c. 67, sec. 35.

The exceptions are: 1. That an adopted child shall not inherit property expressly limited to the heirs of the body of the adopters; and 2. That an adopted child shall not inherit property from their (the adopters') lineal or collateral kindred by right of representation: Rev. Stats., c. 67, sec. 35.

It is plain that neither of these exceptions is applicable to the question now under consideration. They relate to the right to inherit as heirs at law, and not to the right to take under a will. To illustrate, we will suppose that one of the adopting parents is possessed of an estate expressly limited to the heirs of his body. By virtue of the first exception, an adopted child cannot inherit—that is, cannot take as an heir at law—this estate, or any portion of it. It must go to those to whom it is expressly limited. But an adopted child may rightfully inherit an estate not so expressly limited. With respect to such an estate, he must be regarded as a child, an heir, and a lineal descendant of his adopting parents, the same as if he had been born to them in lawful wedlock. By force of the second exception, an adopted child cannot be regarded as an heir at law of his adopting parents' kindred. By adoption, the adopters can make for themselves an heir, but they cannot thus make one for their kindred. To this extent, the two exceptions named operate as a limitation upon the rights of an adopted child. But in all other particulars, he is the child, the heir, and a lineal descendant of the adopting parents, to all intents and purposes, the same as if he had been born to them in lawful wedlock. And within the rights and powers thus conferred upon him, and without infringement of either of the exceptions referred to, an adopted child may take a devise or legacy given by will to one of his adopting parents, and thus prevent the devise or legacy from lapsing, in case the parent dies before the testator, precisely the same, and with the same limitations, as if he were a child born to such parent in lawful wedlock.

In such a case, a child born in lawful wedlock does not "inherit" the devise or legacy from his parents' kindred. One who takes under a will does not "inherit." To inherit is to take, as an heir at law, by descent or distribution. To take

under a will is not to inherit. And when an adopted child takes a legacy given by will to one of his adopting parents, he does not take as an heir at law of the parent's kindred. He does not "inherit" the legacy from the testator. He takes as a lineal descendant of the legatee, by force of the statute: Rev. Stats., c. 74, sec. 10; not as a lineal descendant by birth, but as a statutory lineal descendant, and as lawfully in the line of descent as if he were placed there by birth.

It is as competent for the legislature to place a child by adoption in the direct line of descent as for the common law to place a child by birth there. And that is precisely what the legislature has done, and what it undoubtedly intended to do, when, in strong and emphatic language, it declared that a legally adopted child becomes, to all intents and purposes, the child of the adopters, the same as if he were born to them in lawful wedlock, with the two exceptions named, neither of which, as we have already seen, is applicable to such a case. This conclusion is, in our judgment, as indisputable as a mathematical demonstration. We cite, not as directly in point, but as having a bearing on the question, *Ross v. Ross*, 129 Mass. 243; 37 Am. Rep. 321; and *Humphries v. Davis*, 100 Ind. 274; 50 Am. Rep. 788.

Our opinion, therefore, is, that Alice P. Brick, the adopted daughter of Charles H. Brick, is entitled to the estate, real and personal, given to the latter by the will of Martha H. Wright, and which the said Charles H. Brick would have taken if he had survived the testatrix. And as the question was new, and the parties seem to have acted in good faith in taking the opinion of the court, the costs of the litigation, including moderate counsel fees, may be paid by the administrator, and charged to the estate in his administration account.

Bill sustained.

PARENT AND CHILD — EFFECT OF ADOPTION. — The effect of adoption is to cast succession on the adopted child, in case the adopting father dies intestate: *Morrison v. Estate of Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500, and note; see note to *In re Ingram*, 12 Am. St. Rep. 100, 101. The adoption of an illegitimate child by the father and his wife, under the statute, does not render such child his "issue," so as to defeat a remainder created by will, and made contingent upon his leaving no children: *Jenkins v. Jenkins*, 64 N. H. 407.

GODDARD v. INHABITANTS OF HARPSWELL.

[84 MAINE, 489.]

MUNICIPAL CORPORATIONS — LIABILITY OF. — When a public officer, in the line of his duties, does a public work within a town, for the public benefit or use, the town, in the absence of any direction to him, is not liable for his misconduct in such work, though it appointed him, and is obliged to pay the costs of the work, and therefore a town is not answerable to one whose property was taken and used in the construction of a highway by a highway surveyor, charged with the duty of opening and keeping in repair all public highways, and who is appointed and paid by the town.

C. W. Larrabee, for the plaintiff.

Weston Thompson, for the defendants.

EMERY, J. The county commissioners of Cumberland County, upon an appeal from the refusal of the selectmen, laid out a town road in Harpswell. This action of the commissioners was, upon appeal, affirmed by this court, and the certificate of affirmance sent down May 31, 1886. Within the limits of the road thus located, the plaintiff had, prior to the location, placed some amount of stone, timber, and earth, with the consent of the owners of the land, for the purpose of constructing a road and bridge, along the same line afterward located by the commissioners.

After the location and establishment of the road by the commissioners, as affirmed by this court, the road and the necessary bridge therein were constructed, and the stone, timber, and earth of the plaintiff, found within the limits of the location, were used in such construction. The plaintiff, assuming that this taking and using of his material were by the direction of the town, or by its authorized agents, brought this action of trover against the town for such conversion. He recovered a verdict, which the town has moved the court to set aside as against law and evidence.

There is no evidence in the case that the town ever voted to open or build the road or bridge, or appropriated any money or appointed any agents for that purpose, or gave any instructions to any officers, or in any way ever even considered the question. Nor is there any evidence that the municipal officers ever in any way took any direction or cognizance of the matter. Counsel and witnesses spoke incidentally of the road and bridge having been built by the town, and now the plaintiff asks us to assume that the town built the

road and bridge, inasmuch as it was the town's duty to do so, and we may assume that it did its duty. He means for us to assume that the town directly, by vote, assumed charge, appointed agents, and gave directions in the matter.

But in the absence of any evidence showing any action of the town or its municipal officers in the premises, we cannot assume anything more than that the road and bridge were built by the usual public officer (in this case the highway surveyor of the district), in accordance with the directions of the statute and the commissioners. This assumption gives full effect to any presumption of duty done, and indeed such acts of public officers are commonly spoken of as acts of the town, though not technically or legally so.

Giving the plaintiff the full benefit of this assumption, is the town proven guilty of the unlawful conversion of his material?

It is settled law that when a public officer, in the line of his duty, does a public work within a town, for the public benefit or use, the town, in the absence of any directions to him, is not liable for his misconduct in such work, even though it appointed him, and is obliged to pay the cost of the work: *Small v. Danville*, 51 Me. 359; *Mitchell v. Rockland*, 52 Me. 118; *Cobb v. Portland*, 55 Me. 381; 92 Am. Dec. 598; *Woodcock v. Calais*, 66 Me. 234; *Farrington v. Anson*, 77 Me. 406; *Bulger v. Eden*, 82 Me. 352.

A highway surveyor is a public officer, charged with a public duty "to open and keep in repair" public ways legally established within his district. He is appointed and paid by the town, and the town supplies him with the necessary funds for the performance of his duty. But the town does all this as a public duty, not for its own peculiar gain. It has no proprietorship in the roads and bridges built and maintained by taxes upon its inhabitants. The roads and bridges belong to the public.

In appointing highway surveyors, in raising and expending money for roads and bridges, the town acts simply as the political agent of the state, and should have no more pecuniary liability for the misconduct of such officer than should the governor for the misconduct of a public officer bearing his commission. Of course, the statute may impose such a liability on a town, as it may on the governor, but no such statute is invoked or cited in this case.

It was in accordance with these principles that *Small v.*

Danville, 51 Me. 359, was decided. In that case the plaintiff had some split stones lying upon the land taken for a highway when the way was located. In building a culvert in this highway, the highway surveyor of the town used this split stone, and the plaintiff brought an action of trespass against the town. It was conceded that the using of the stone constituted a trespass, but it was held that the town was not liable. That case was very like this in its facts. The surveyor was evidently opening and making a road just located. The principle there established is decisive of this case.

The plaintiff cites several cases from Massachusetts, which should be noticed. In *Hawks v. Charlemont*, 107 Mass. 414, the town voted to take charge, and appointed its selectmen as agents with full discretion. It did not leave the work to the highway surveyors. In *Deane v. Randolph*, 132 Mass. 475, the town voted to put the selectmen in charge of the work, and they assumed such charge, hiring men, etc. In *Waldron v. Haverhill*, 143 Mass. 582, the city, "instead of leaving the duty of keeping the highways in repair to be performed by the officers and in the methods provided by the general laws," assumed to perform it by means of its own agents. In *Doherty v. Braintree*, 148 Mass. 495, the town voted to take charge of the work, and appointed a committee of five to act with the selectmen, all as agents of the town.

On the other hand, in the later case in the same state, *Prince v. Lynn*, 149 Mass. 193, the same court reiterated the doctrine that the municipality was not liable for the misconduct of its highway surveyors while engaged in their public duties. In the still later case of *Hennessey v. New Bedford*, 153 Mass. 260, the city voted a specific sum of money for the improvement of a particular street. The mayor and street commissioner, without special instructions, assumed the care of the work. Held, that the city was not liable for their misconduct in the premises.

The distinction between the two classes of cases is clear. In the one class, the municipality has interfered by giving directions, or taking charge of the work by its own agents, as in *Woodcock v. Calais*, 66 Me. 234. In the other class, the municipality has not interfered, "but has left the work to be performed by the proper public officers, in the methods provided by the general laws."

Upon a new trial the plaintiff may be able to adduce evidence which will bring the case within the former class, but

upon the evidence now before us, the case is clearly within the latter class.

The exceptions do not need to be considered.

Motion sustained. New trial granted.

Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents.*

The Purpose of This Note is to consider the liability of municipal corporations for the wrongful acts and omissions of their servants and agents. These corporations, like other corporations aggregate, cannot act or omit to act except through and by their officers and agents, and therefore, in every instance in which they have been held answerable for any wrongful act or omission, it must necessarily have been a wrongful act or omission on the part of one or more of their officers or agents, or of some person who, though not strictly occupying the relation of an officer or agent, yet is one to whom the municipality has deputed the performance of some duty, and has thus made itself answerable for his wrongful act or omission relating thereto.

With Respect to the General Principles by which the liability of municipal corporations must be determined, the divergence of judicial opinion is not greater than might naturally be expected, where the subject is so difficult and important, and the circumstances to which the principles are to be applied are so variant. These corporations are regarded, with reference to some of their duties and functions, as representing and acting for the state or sovereign, and with reference to others, as acting for themselves, somewhat as private corporations, and, generally, when acting in the former capacity they are not answerable for the acts or omission of their officers or agents, while when acting in the latter capacity their liability is ordinarily the same as that of a private person or corporation. The great difficulty and the great divergence of judicial opinion arise from the fact that no test has been formulated by which to decide with unerring accuracy whether a particular act or omission occurred in the discharge of governmental or of quasi private duties.

General Test of Municipal Liability. — If the duty in respect to which there has been a wrongful act or omission is one resting primarily upon the municipality, and is not a mere governmental duty, the performance of which has been delegated to the municipality by competent legislative authority, then the liability of the municipality is substantially that of a private corporation. Hence one of the tests formulated and applied by the courts of New York is as follows: "To determine whether there is municipal responsibility, the inquiry must be, whether the department whose misfeasance or non-feasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a duty primarily resting upon the municipality": *Morgott v. Mayor*, 96 N. Y. 273; 48 Am. Rep. 622; *Pettengill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442. "Whenever," said the supreme court of

*** REFERENCE TO MONOGRAPHIC NOTES.**

Liability of cities for neglect to repair streets: 63 Am. Dec. 350-357.

Liability of cities for unauthorized acts of their officers: 100 Am. Dec. 333-339

Liability of cities for defects in and want of repair of sewers: 29 Am. St. Rep. 737-741.

Tests for determining city's liability for damages occasioned in the execution of governmental or sovereign powers: 66 Am. Dec. 434-442.

Georgia, "the negligence or non-feasance of the ordinary agents and servants of the corporation, as distinguished from that of its officers, causes the injury, or when the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the corporation is exercising, as a corporation, its private franchise powers and privileges, which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public, then, and only then, it becomes liable for the negligent exercise of such powers precisely as are individuals": *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256, 258. In an action against the representatives of the city of New York to recover for injuries resulting from alleged negligence in keeping open an excavation in the street unguarded and unlighted at night, the court of appeals of that state said: "The corporation of the city of New York possesses two kinds of powers,—one governmental and public, and to the extent they are held and exercised, is clothed with sovereignty; the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual. The distinction between these two classes of powers is obvious, and has been frequently recognized and established in our courts: *Wilson v. Mayor etc. of New York*, 1 Denio, 595; 43 Am. Dec. 719; *Bailey v. Mayor etc. of New York*, 3 Hill, 531; 38 Am. Dec. 669; *Mayor etc. of New York v. Bailey*, 2 Denio, 450, opinion of Hand, S.; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; 53 Am. Dec. 316. Although the difference between the two kinds of powers is plain and marked, yet, as they approximate each other, it is oftentimes difficult to ascertain the exact line of distinction. When that line is ascertained, it is not difficult to determine the rights of parties; for the rules of law are clear and explicit which establish the rights, immunities, and liabilities of the appellants when in the exercise of each class of powers. All that can be done, probably, with safety is to determine, as each case arises, under which class it falls": *Lloyd v. Mayor etc. of New York*, 5 N. Y. 369; 55 Am. Dec. 347.

Liable in Respect to Municipal Duties only. — Doubtless many decisions may be found in which the liability of municipal corporations for the acts or omissions of their officers or agents is compared to that of private persons or corporations, and language is used from which the inference might be drawn that whenever the latter are liable the former are equally so: *Cline v. Crescent City R. R. Co.*, 41 La. Ann. 1031; *Ross v. Madison*, 1 Ind. 281; 48 Am. Dec. 361; *Wallace v. Muscatine*, 4 G. Greene, 373; 61 Am. Dec. 131; *Templin v. Iowa City*, 14 Iowa, 59; 81 Am. Dec. 455; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434; *Cotes v. City of Davenport*, 9 Iowa, 227; *Mayor of Helena v. Thompson*, 29 Ark. 569, 573; *Denver v. Dunsmore*, 7 Col. 328; *Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594; *Greencastle v. Martin*, 74 Ind. 449; 39 Am. Rep. 93; *Platz v. Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286. These decisions, like all others, must, however, be considered and construed in connection with the attendant facts, and then they will generally not be found inconsistent with the principle hereinbefore stated, and which restricts the liability of municipalities to acts or omissions relating to the discharge of quasi private duties. It is true that nearly every duty that a municipality is by law called upon to discharge affects, or may affect, many persons, and may without impropriety be

styled "a public duty"; and the fact that the duty is to some extent a public one may not exclude municipal liability, if the city, in contemplation of law, has undertaken the performance of the duty in consideration of the privileges and emoluments granted by its charter, or for the purpose of gain or profit for itself. Hence, if a public improvement is maintained by a municipality, for the use of which it has the right to exact tolls, there is no question of its liability to respond in damages for injuries resulting from the negligence of its officers or agents in respect to such improvement; and though no profit is to be realized by the municipality from the performance of a duty confided to it, there are many authorities supporting the view that its acceptance of the charter imposing such duty is equivalent to an agreement on its part that it will perform it, and hence, that liability results from its non-performance or negligent performance, and is enforceable by any one injured thereby: *City of Denver v. Dunsmore*, 7 Col. 332; *Henly v. Mayor of Lyme*, 5 Bing. 91; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 685; *Scott v. Manchester*, 2 Hurl. & N. 204; 26 L. J. Ex. 406; *Cowley v. Sunderland*, 6 Hurl. & N. 565; 30 L. J. Ex. 127. "These decisions proceed on the ground that where a municipal corporation acts in the exercise of powers or the discharge of duties, in no wise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common-law liability for the acts of its servants; and that it does not matter, as was once intimated, if there be the absence of special rewards or advantages, it being considered and allowed that such gratuitous function is to be regarded as a burden accepted under the charter in consideration of its privileges": *City of Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 464; *Barton v. Syracuse*, 36 N. Y. 54; *City of Galveston v. Posmainsky*, 62 Tex. 118, 128; 50 Am. Rep. 517; *Baugus v. Atlanta*, 74 Tex. 629; *Klein v. Dallas*, 71 Tex. 280. If the duty imposed by the charter is clearly defined, and the municipality has no discretion to do or to omit it, as in the judgment of its officers may seem proper, it is generally characterized as a ministerial duty, and the city is held answerable for wrongful acts or omissions in its performance: *Barton v. Syracuse*, 36 N. Y. 55; *Clayburgh v. Chicago*, 25 Ill. 535; 79 Am. Dec. 346; *City of Elgin v. Eaton*, 83 Ill. 537; 25 Am. Rep. 412; *Clark v. Washington*, 12 Wheat. 40; *Weightman v. Washington*, 1 Black, 40; *Orme v. Richmond*, 79 Va. 86. And unless the duty of the corporation is in this sense ministerial, no municipal liability can result from its non-performance, or from its performance in a negligent or insufficient manner: *City of Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35. Therefore, in ascertaining whether a city is liable for a given wrongful act or omission, the inquiry must be, whether the duty of the municipality was, within the meaning of the decisions upon the subject, ministerial or not. In this connection it should be remembered that the officers of a city may be charged with many duties which are not duties of the municipality, by the non-performance or negligent performance of which it and some or all of its citizens may be damaged. When such is the case, the city is not in default, though its officer may be, and he, instead of it, is liable to indemnify persons injured by his misfeasance or non-feasance. "If the act of the officer or the subordinate of the officer is done in the attempted performance of a duty laid by law upon him, and not upon the municipality, then the municipality is not liable for his negligence therein": *Maximilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468.

Classification of Cases of Non-liability. — The cases in which municipalities are not answerable for injuries resulting from their wrongful acts or omissions, or that of their officers or agents acting by their sanction, resolve

themselves into three classes, to wit: 1. Cases in which the alleged duty was discretionary, and its performance could not be compelled or controlled at the instance of a citizen, tax-payer, or other person, but might or might not be undertaken, as the governing authorities of the municipality should determine; 2. Cases in which, while it was the duty of the officers of the municipality to act in a mode prescribed by the law, yet in such action they were discharging a governmental duty delegated to the municipality by the legislature, out of which no liability could have arisen had such authority not been delegated, and its performance had been entered upon by some other governmental agency; 3. Cases in which the officer, though acting in his official capacity, is not discharging any municipal duty, as where a city surveyor is called upon to make a survey, or a city marshal or other officer to levy a writ. In respect to these duties he is no more the agent or servant of the city than if he were an officer of the county or state, or were a mere private person voluntarily undertaking their performance.

In the first class are included all those actions in which a recovery is sought upon the ground that the municipality, by adopting some ordinance or regulation, might have prevented the injury complained of. Thus when a plaintiff alleged that he was injured by the explosion of a manufactory of fire-works while assisting in extinguishing a fire, and that it was the duty of the city in which such works were operated to have suppressed them by exercising the power granted to it to prohibit the manufacture, sale, or exposure of fire-works, or other inflammable or dangerous articles, the allegation was, upon demurrer, held to be insufficient to establish any liability against the city, because no person had any right to demand that the power vested in the municipality be exercised in any particular way: *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681. When a discretion exists as to doing or omitting the performance of any alleged duty, or as to the manner in which it shall be performed, and the exercise of such discretion involves legislative or judicial action, there can be no recovery of the municipality because it failed to act, or acted in a particular manner. In one thing the authorities "all unite, and that is, in affirming that no recovery can in any event be had where the negligence of the municipal corporation consists in failing to perform a legislative, judicial, or discretionary duty, or in simply performing such a duty in an improper method": *Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35; *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342; *Dooley v. Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209; *Kiley v. City of Kansas*, 87 Mo. 103; 56 Am. Rep. 443; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810. Therefore, in no instance can a recovery be sustained on the ground that the injuries complained of arose out of the failure of the municipality to enact an ordinance, the enactment of which was within the powers granted to its common council: *Wheeler v. Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 837; *City of Lafayette v. Timberlake*, 88 Ind. 330. Nor on the ground that it had enacted an ordinance permitting the doing of the act complained of, unless such act was necessarily injurious or unlawful: *Burford v. Grand Rapids*, 53 Mich. 98; 51 Am. Rep. 105; *Forsyth v. Atlanta*, 45 Ga. 152; 12 Am. Rep. 576; *Rivers v. Augusta*, 65 Ga. 376; 38 Am. Rep. 787; *Hill v. Charlotte*, 72 N. C. 55; 21 Am. Rep. 451. As to licensing acts necessarily dangerous or unlawful, see *Little v. Madison*, 42 Wis. 643; 24 Am. Rep. 435; *Stanley v. Davenport*, 54 Iowa, 463; 37 Am. Rep. 216.

Plan of Work, Error in. — As a general rule, when to a municipality is delegated the authority of determining how a duty shall be performed, its erroneous determination cannot result in its liability. For instance, if

it determines to construct works of a public character and for the public benefit, and in deciding upon the plan for their construction errs, so that when they are constructed in accordance with such plan they are insufficient to accomplish the purpose intended, and from such insufficiency a private person is injured, he is without redress: *City of Denver v. Capelli*, 4 Col. 25; 34 Am. Rep. 62; *Child v. Boston*, 4 Allen, 41; 81 Am. Dec. 680; *Fair v. Philadelphia*, 88 Pa. St. 309; 32 Am. Rep. 455; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *Van Pelt v. Davenport*, 42 Iowa, 308; 20 Am. Rep. 622; *Johnston v. District of Columbia*, 118 U. S. 19; *Stackhouse v. Lafayette*, 26 Ind. 17; 89 Am. Dec. 450.

To the rule exempting municipalities from liability for injuries resulting from the plan of a public work, some limitation is essential, and must be conceded. For instance, if it is a part of the plan, or a necessary consequence of its execution, that private property must be invaded or destroyed, its owner is not without redress; for such invasion or destruction is not an object for the accomplishment of which the municipality is authorized to plan. So, doubtless, any plan of a public work which, if faithfully executed, must obviously result in the creation and maintenance of a nuisance cannot be so executed without creating a right of action in favor of one specially damaged thereby. Hence if the plan for a public sewer requires its contents to be discharged upon private property, the municipality must respond in damages: *Lehn v. San Francisco*, 66 Cal. 76; *Weis v. City of Madison*, 75 Ind. 241; 39 Am. Rep. 135. To hold otherwise would enable municipal authorities, under the pretense of exercising their discretion in planning a public improvement, to willfully destroy private rights of property. In some of the cases the liability is said to result from negligence in exercising the power of devising and adopting plans: *City of Evansville v. Decker*, 84 Ind. 325; 43 Am. Rep. 86. But if the liability of the municipality can result from negligence in devising a plan, we apprehend that the negligence must be gross. In other words, that it must be such as to indicate a willful indifference to probable injurious consequences; and perhaps the liability of the city, however unskillfully devised and inadequate the plan may be, must be limited to cases where the execution of the plan "must necessarily cause an injury to private property equivalent to an appropriation of some enjoyment thereof to which the owner is entitled." In such a case the right of the owner to redress by civil action must necessarily be affirmed: *Detroit v. Beckman*, 34 Mich. 125; 22 Am. Rep. 507; *Perry v. Worcester*, 6 Gray, 544; 66 Am. Dec. 431; *Stoddard v. Saratoga Springs*, 127 N. Y. 261; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Seymour v. Cummins*, 119 Ind. 148.

Classification of Cases of Non-liability, though Duty is not Discretionary. — In the second and third class of cases are included those in which the municipality or its officers or agents have been guilty of some wrongful act or omission of which it cannot be truly said that they had a discretion to act or to omit to act, as in their judgment seemed best, but in respect to which the immunity from liability rests either upon the ground that the municipality was but a mere instrumentality of the state, or the officer whose wrongful act or omission has caused the injury was, though not acting in the discharge of any governmental function, charged with a duty prescribed and limited by law, and in respect to which he was the servant and agent of, and controlled by the law, and not the agent or servant of nor controlled by, the municipality. Speaking upon this subject, the supreme court of South Carolina said: "There is no statute in this state authorizing an action against a municipal corporation

for non-feasance as to a public duty. The general doctrine is, that civil or municipal corporations are public in their nature, but instrumentalities of the state which incorporate them to assist the state in more effectually discharging its duty. The powers conferred on such corporations are not always uniform, but they generally relate to the administration of justice, the support of the poor, the establishment and repairs of highways, etc., all of which are matters of state as distinguished from local concern. It seems to have been considered, that as the state cannot be sued, these governmental agents of the state should not be liable in an action of tort for either non-feasance or misfeasance; that they are not liable in case, or trespass, or other form of civil action for neglect of public duty, unless such liability be expressly declared by statute": *Black v. City of Columbia*, 19 S. C. 412; 45 Am. Rep. 785, 790; *Fowle v. Alexandria*, 8 Pet. 398.

Public Duties, Liability in Discharge of. — As already remarked, the fact that a duty is partly public does not necessarily exonerate the municipality from liability, for the reason that there are some public duties which municipalities are deemed to have assumed in consideration of the privileges conferred by their charters, and it is not probable that any test can be formulated upon which all the courts will agree, and from which one can always determine whether a duty is public in the sense that relieves a municipality from liability for negligence consisting either in its non-performance or its performance in a careless and injurious manner. If the duty of performance arises from the special provisions of the municipal charter, instead of from general laws applicable to all municipalities, this fact may sometimes be decisive, the inclination of the courts being to exonerate the municipality from liability where the duty is not imposed by its charter. The impossibility of the municipality receiving benefit from the performance of a duty is also entitled to great consideration. Perhaps the leading case upon this subject is *Hill v. City of Boston*, 122 Mass. 344; 23 Am. Rep. 332. The plaintiff in that case sought to recover for injuries suffered while attending a public school from the unsafe condition of a stairway in the school-house. There was no special provision in the charter of the city prescribing its duties in the construction, maintenance, and repair of school-houses, and whatever was due from it resulted from provisions in the general statutes of the state, equally applicable to all municipalities. The decision of the court was written by Chief Justice Gray, and in it municipal liability was more thoroughly considered than in any other opinion coming within our observation, and the conclusion which the learned judge reached, and the arguments used, and the authorities cited by him strongly tend to the denial of municipal liability in many instances in which such liability is conceded by the weight of authority upon the subject. Especially is this true in regard to liability for negligence in the maintenance and repair of public bridges and highways. The judge commenced by saying that "we had supposed it to be well settled in this commonwealth that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage." That the supposition with which the learned judge began his investigations was by them strengthened into immovable conviction is apparent from the following extract from the closing passages of his opinion: "We find it difficult to reconcile the view that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon

it with the doctrine that the purpose of the creation of municipal corporation by the state is to exercise a part of its powers of government,—a doctrine universally recognized, and which has nowhere been more strongly asserted than by the supreme court of the United States in the opinions delivered by Mr. Justice Hunt in *United States v. Railroad Co.*, 17 Wall. 322, 329, and by Mr. Justice Clifford in *Laramie v. Albany*, 92 U. S. 307, 308. But however it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby."

In New Hampshire, an action was brought by a person injured by reason of his horse taking fright at a stream of water thrown from a hydrant which was being tested by the fire department of a city for the purpose of ascertaining its capacity and utility in supplying water to extinguish fires. The duties of the officers whose negligence was complained of were prescribed by general laws, and not by special municipal charter, and the principles applicable to the case were manifestly identical to those applied to the case last cited, and so the court ruled, saying: "No private action, in the absence of a statute giving it, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage. To charge a corporation with damages for injuries arising from misfeasance and neglect of duty, no statute fixing the liability, there must be acts positively injurious committed by authorized agents or officers in the course of the performance of corporate powers, or in the execution of corporate duties, in distinction from those done in a public capacity as a governing agency": *Edgerly v. Concord*, 62 N. H. 8; 13 Am. St. Rep. 533, 535; *Clark v. Manchester*, 62 N. H. 577. Upon the same principle the liability of municipalities for negligence in not providing suitable apparatus and a sufficient supply of water to extinguish fires is denied: *Wright v. City Council of Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256.

Public Duties Voluntarily Assumed.—In the cases to which we have referred, the duty was imposed by general law, and the municipality had no legal right to refuse to perform it. But if the duty is of a public nature, and is one from the performance of which the municipality can derive no gain, it is not material that, instead of being compelled by statute, it is voluntarily assumed by statutory permission. "The motive and the object are the same, though in some instances the legislature determines finally the necessity or expediency, and in others it leaves the necessity or expediency to be determined by the towns themselves. But when determined, and when the service has been entered upon, there is no good reason why a liability to a private action should be imposed when a town voluntarily enters upon such a beneficial work, and withheld when it performs the service under the requirement of an imperative law. To make such a distinction would not have the effect to encourage towns in making liberal provision for the public good. It is well known that many towns in Massachusetts, not bound to do so,

voluntarily maintain high schools. It is not to be supposed that the legislature have intended to make such towns liable to private actions, when towns required to maintain high schools would be exempt. On the other hand, it has been recognized in numerous cases, in this state and elsewhere, that the question of the liability of towns does not rest upon this distinction: *Bigelow v. Randolph*, 14 Gray, 541; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Clark v. Waltham*, 128 Mass. 567; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Wixson v. Newport*, 13 R. L. 454; 43 Am. Rep. 35; *Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461; *Tindley v. Salem*, 137 Mass. 171; 50 Am. Rep. 289, 294. Hence if authority is given by statute to maintain workhouses or almshouses to relieve poor and indigent persons, the fact that the municipality, acting under the permission of the statute, maintains such workhouses does not make their maintenance any the less a public duty, and the city is exempt from liability to the same extent as if their maintenance had been compulsory instead of permissive; nor can the city be held answerable on the ground that some revenue is derived from the labor of the inmates, if the institution is not conducted with a view to pecuniary profit: *Curran v. Boston*, 151 Mass. 505; 21 Am. St. Rep. 465. Many other cases may be cited in which the general principle is declared, that a municipality is not answerable for the acts or neglects of its officers or agents intrusted with the discharge of a public duty: *Stewart v. New Orleans*, 9 La. Ann. 461; 61 Am. Dec. 218; *County Comm'rs v. Duckett*, 20 Md. 468; 83 Am. Dec. 557; *Gibbes v. Beaufort*, 20 S. C. 213; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Brown v. Guyandotte*, 34 W. Va. 299; *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485; *Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461; *Bailey v. New York*, 3 Hill, 531; 38 Am. Dec. 669; *Maximilian v. New York*, 62 N. Y. 60; 20 Am. Rep. 468; *City of Lafayette v. Timberlake*, 88 Ind. 330.

Public Duties Imposed by Municipal Charters. — The fact that the duty was imposed by the charter instead of by a general law has not always been regarded as controlling. Thus where it was part of the policy of the state to secure the safety of steam-boilers within its limits, by providing for their inspection, and with respect to one municipality this duty was, by its charter, devolved upon it, and it was therefore contended that the city was answerable for damages alleged to have been occasioned by the negligence of an inspector appointed by it, the supreme court of the state, denying this liability, said: "The state has seen fit to attempt by legislation to secure the safety of steam-boilers within its limits, and for this purpose has provided for the appointment of inspectors in the several congressional districts into which the state is divided. If the legislature had provided for the appointment of inspectors by the several cities within their respective limits by the same statutes under which the governor acts in making similar appointments, it would be difficult to maintain that the city would be liable for the inspector's negligence without also maintaining that the governor would likewise be liable for the negligence of his appointees. Both the city and the governor would be acting in the discharge of a public duty, and the duties to be performed by the person appointed are also public. The duty of inspection of boilers is recognized by the statute as governmental. The object of the inspection is to protect all citizens from danger, who may come in contact with the boiler, or who may be exposed in any way to danger from its unsafe condition. The city of New Haven, as such, has no pecuniary or individual or private interest in the matter, and although the power

of the city over the subject is conferred by the charter, and not by the general law, yet the city must, we think, be regarded as the agent of the government, and acting for the state, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence": *Mead v. New Haven*, 40 Conn. 72; 16 Am. Rep. 14.

Public Streets, Cases Holding Duty in Respect to, is Public, and not Municipal. — In putting or keeping in proper condition and repair the streets of a municipality, its officers discharge or fail to discharge a duty public in its character, and from which it, in our judgment, receives no special benefit or profit. Doubtless, its residents use its streets more frequently than residents of other parts of the state, and in that sense reap a greater benefit from them. But this is more emphatically true of the public schools, and as to them we believe it is conceded that the municipality and its officers exercise governmental functions, for a mistaken or negligent exercise of which no liability can accrue against the municipality. In several of the states, therefore, where the law, whether contained in the charter or elsewhere, merely confers upon the municipality or certain of its officers authority to lay out, establish, or repair public streets, without expressly making the municipality answerable for negligence, no recovery can be sustained against it for injuries suffered by the failure to keep the streets in proper repair, or for any obstruction or defect in them. In California, an action was brought to recover compensation for injuries sustained in falling through a bridge which was part of the public street. The charter of the city provided that its common council should have power to cause the streets to be cleaned and repaired, and the plaintiff insisted "that, the power being conferred, a correlative duty is imposed, and a consequent liability for non-performance of such duty arises in favor of individuals who may have suffered injury by reason of its non-performance." But the court answered that the duty was by the terms of the statute imposed upon the officers, rather than upon the municipality, and that the result of the reasoning in favor of the plaintiff was to affirm the liability of the officers, rather than of the city, and further, that incorporated cities were, under the laws of the state, "mere governmental instruments formed under the state laws for the purposes of internal administration, . . . not distinguishable in principle from counties created by law for the same purpose," and as the latter were not liable, neither were the former: *Winbigler v. Los Angeles*, 45 Cal. 36; *Tranter v. Sacramento*, 61 Cal. 271; *Okope v. City of Eureka*, 78 Cal. 588; 12 Am. St. Rep. 118. The decisions of Arkansas, Connecticut, Massachusetts, Michigan, New Jersey, and Vermont are in harmony with those of California upon this subject, and, in the absence of any statute imposing liability upon the city, hold that a person injured by defects in or non-repair of public streets is without redress by action against the municipality: *Arkadelphia v. Windham*, 49 Ark. 139; 4 Am. St. Rep. 32; *Young v. City Council etc.*, 20 S. C. 116; 47 Am. Rep. 827; *Navasota v. Pearce*, 46 Tex. 525; 26 Am. Rep. 279; *Detroit v. Blackely*, 21 Mich. 84; 4 Am. Rep. 250; *McCutcheon v. Homer*, 43 Mich. 483; 38 Am. Rep. 212; *Barry v. City of Lowell*, 8 Allen, 127; 85 Am. Dec. 690; *Young v. Commissioners*, 2 Nott & McC. 537; *Hill v. City of Boston*, 122 Mass. 344; 23 Am. Rep. 332; *French v. City of Boston*, 129 Mass. 692; 37 Am. Rep. 398; *Hewson v. City of New Haven*, 37 Conn. 475; 9 Am. Rep. 342; *Pray v. Mayor of Jersey City*, 52 N. J. L. 394; *Bates v. Rutland*, 62 Vt. 178; 22 Am. St. Rep. 96; though in some of these states there now exists municipal liability, expressly created by statute: *City of Grand Rapids v. Wyman*, 46 Mich. 518; *Dutton v. Village of Albion*, 50 Mich. 129; *Cromarty v. Boston*, 127 Mass. 329; 34 Am. Rep. 581.

Public Streets, Cases Affirming Municipal Liability for Negligence in Respect to. — The ground upon which municipal liability is denied is the obvious one that the duty of keeping the streets in repair is a public duty, from the performance of which the municipality derives no emolument or special advantage; and the mere fact that it was created in and by the charter does not result in any implied contract on the part of the city that it will exercise it without error or negligence. While, in our judgment, these reasons are both pertinent and convincing, there is no doubt that such is not the judgment of a decisive majority of the courts of this country, both state and national. They proceed upon the ground that the duty of keeping in repair and in proper and safe condition all highways within a city is peculiarly a municipal duty, — one which is rarely, if ever, confided to any other than municipal authority, — and that the existence of this duty implies that redress shall be accorded in the courts to any one injured by its non-performance or misperformance. While in many of the cases the power of the municipality is conferred by its charter, this does not appear to be essential, and the liability of the municipality has been affirmed when the statute imposing the duty was to be found in the general laws of the state, as well as where it was implied from the terms of the charter: *Cleveland v. King*, 132 U. S. 295; *Carlington v. Fredericks*, 46 Ohio St. 442. Nor does it seem to be essential that the duty shall rest upon an express legislative command. It is sufficient that the power to control, improve, and repair the streets within its boundaries is conferred upon the municipality, and it is provided with means which, if exercised, will enable it to execute the power granted: *Hutson v. Mayor etc.*, 9 N. Y. 163; 59 Am. Dec. 526; *Albrittin v. Huntsville*, 60 Ala. 486; 31 Am. Rep. 46; *Nolde v. Richmond*, 31 Gratt. 271; 31 Am. Rep. 726; *Erie v. Schwingle*, 22 Pa. St. 384; 60 Am. Dec. 87; *O'Neill v. New Orleans*, 30 La. Ann. 220; 31 Am. Rep. 221; *Hitchins v. Mayor of Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422. The duty of the municipality with respect to its streets is treated as ministerial, and it is therefore held liable for any injuries resulting from negligence in the performance or non-performance of such duty, whether it results in a defect in a street or sidewalk from which injury follows to a person using it with due care, provided the defect is one of which the municipality and its officers had notice, or of which they could not be ignorant without being negligent in the discharge of their duties: *Bradford v. Mayor of Aniston*, 92 Ala. 349; 25 Am. St. Rep. 60; *Baltimore City v. Marriott*, 9 Md. 160; 66 Am. Dec. 326; *Taylor v. Cumberland*, 64 Md. 68; *Cline v. Crescent City R'y Co. and City of New Orleans*, 43 La. Ann. 327; 26 Am. St. Rep. 187; note to *Browning v. City of Springfield*, 63 Am. Dec. 350-357; *Weisenberg v. Appleton*, 26 Wis. 56; 7 Am. Rep. 39; *Saulsbury v. Ithaca*, 94 N. Y. 27; 46 Am. Rep. 122; *Peoria v. Simpson*, 110 Ill. 294; 51 Am. Rep. 683; *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *Cleveland v. King*, 132 U. S. 295, 303; *Clark v. Richmond*, 83 Va. 355; 5 Am. St. Rep. 281; *Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35; *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634; *Farquar v. Roseburg*, 18 Or. 271; 17 Am. St. Rep. 732; *Manderschid v. City of Dubuque*, 29 Iowa, 73; 4 Am. Rep. 196; *Board of Comm'rs v. Topeka*, 39 Kan. 197; *Young v. Village of Waterville*, 39 Minn. 196; *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144; *City of Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594; *Oleon v. City of Chippewa Falls*, 71 Wis. 558; *Whitfield v. City of Meridian*, 66 Miss. 570; 14 Am. St. Rep. 596; *City of Olathe v. Mixee*, 48 Kan. 435; *ante*, p. 308. In some of the states, the liability of municipalities for injuries suffered in the public streets has been affirmed in exceptional cases, to which the application of well-settled

legal principles ought to have led to a different result. Thus where a city adopted an ordinance prohibiting, under the penalty of a fine, "any sport, play, or exercise that might produce bodily injury, or endanger property on any street, square, or alley within the city limits," it was held that the city might be answerable for injuries suffered by plaintiff while crossing a sidewalk, "inflicted by a sled on which a number of boys were coasting on the snow, which at the time covered the streets and the sidewalks," unless it appeared that vigorous efforts were made to enforce the ordinance: *Taylor v. Mayor of Cumberland*, 64 Md. 68; 54 Am. Rep. 759. But it is manifest that the enforcement of an ordinance of this character must depend on the skill and vigilance of the police; and as the city is never answerable for their negligence of inaction, it ought not to be held liable for their not enforcing its ordinance against coasting: *City of Lafayette v. Timberlake*, 88 Ind. 330; *Faulkner v. City of Aurora*, 85 Ind. 130; 44 Am. Rep. 1; *Schultz v. City of Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779.

If a city undertakes to repair or improve a street, it is also liable for the neglect of its officers or agents in leaving the street in dangerous condition without proper guards or signals to prevent accidents or warn travelers of danger: *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *Kimball v. Bath*, 38 Me. 219; 61 Am. Dec. 243; *Barney Dumping-boat Co. v. New York*, 40 Fed. Rep. 50. Negligence may consist of permitting a dangerous object or obstruction to remain in a street, as well as permitting it to become or continue out of repair. Hence a city is answerable for injuries suffered by a child of tender years from dangerous machinery, which was permitted to be and remained unguarded for many years in a public highway: *Oceage City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186. Furthermore, the safety of persons lawfully and prudently upon a public street may be endangered without the street itself being out of repair, as where there are dangerous excavations by the side of it, or walls or other objects in it from the falling of which travelers may probably be injured. In such a case, if the wall or other standing object is in a dangerous condition, and therefore liable to fall, or the excavation is one into which a prudent traveler may probably fall, and the city has notice of the danger, it may become answerable to one injured from its failure to erect barriers by the side of the excavation or to have the insecure wall demolished or strengthened: *Bassett v. City of St. Joseph*, 53 Mo. 290; *Kiley v. Kansas*, 87 Mo. 103; 56 Am. Rep. 443; *Parker v. City of Macon*, 89 Ga. 129; 99 Am. Dec. 486; *City of Olathe v. Mince*, 48 Kan. 435; *ante*, p. 308.

The cases to which we have referred as maintaining the liability of cities for damages resulting from the non-repair of streets related to injuries received by persons, or from their or their animals being hurt while passing over such streets, from some defect therein. In the states where municipal liability is conceded for negligence in maintaining streets, such liability may also arise where real property is injured or damaged. Thus embankments may be so constructed as to prevent the natural flow of water, and the culverts in such embankments may be altogether insufficient to permit the passage through them of such water as must reasonably be expected, or drains or gutters may be insufficient or so negligently constructed that they will cause the overflow of water upon the premises of property-holders. The liability of municipalities for defects in and want of repair of sewers was considered in the note to *Chalkley v. City of Richmond*, 29 Am. St. Rep. 737-741, and therefore will not here be treated in detail. It is sufficient here to state that for negligence in their construction, maintenance, or repair, every city is answer-

able to the same extent as for negligence in respect to other parts of the street, whether such negligence results in personal injury, as where a sewer is left open without guard or signal, or in injuries to property by flooding or by depositing offensive material upon or in such close proximity to it as to depreciate its value by rendering it unhealthful or highly disagreeable to the senses: *City Council v. Gilmer*, 33 Ala. 116; 70 Am. Dec. 562; *Fort Wayne v. Coombs*, 107 Ind. 75; 57 Am. Rep. 82; *Chalkley v. Richmond*, 88 Va. 402; 29 Am. St. Rep. 730, and note; *Cooper v. City of Dallas*, 83 Tex. 239; 29 Am. St. Rep. 645; *Mayor of Frostburg v. Duffy*, 70 Md. 47; *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158; *Frostburg v. Hitchins*, 70 Md. 56; *Hardy v. Brooklyn*, 90 N. Y. 435; 43 Am. Rep. 182. The same rule applies to embankments, culverts, dams, drains, and reservoirs, when, through negligence or carelessness in their maintenance, lands are flooded or otherwise damaged: *Ross v. Madison*, 1 Ind. 281; 48 Am. Dec. 361; *Wallace v. City of Muscatine*, 4 G. Greene, 373; 61 Am. Dec. 131; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Perry v. Worcester*, 6 Gray, 544; 66 Am. Dec. 431; *Cooper v. City of Dallas*, 83 Tex. 239; 29 Am. St. Rep. 645; *Aldworth v. Lynn*, 153 Mass. 53; 25 Am. St. Rep. 608.

Public Streets, Defects in Plan of Improvement. — Negligence or carelessness in respect to streets and sewers of which we have spoken as leading to municipal liability relates rather to the mode in which a plan or system is carried out than to the system itself. In determining whether a street shall be laid out or improved, or the manner of its improvement, the municipality exercises quasi legislative or judicial functions, and from error or mistake therein, as a general rule, no liability results. Hence the statement is frequently made in the opinions of the courts, that while liability may exist for negligence in the execution of a plan, it cannot arise from a defect in the plan itself. This rule, while of general, is not of universal application. For a mere error of judgment on the part of the officers of a municipality not so gross as to support the inference of imbecility or willful inattention, a city is not answerable, though as a result of such error public works are constructed from which injury results to persons or property: Note to *Chalkley v. City of Richmond*, 29 Am. St. Rep. 737, 738; *Urquhart v. Ogdenburg*, 91 N. Y. 67; 43 Am. Rep. 655. The tendency of the more recent decisions is to affirm that "any particular plan that may be adopted must be a reasonable one": *Hitchins v. Mayor*, 68 Md. 100; 6 Am. St. Rep. 422. This subject was carefully examined in *Gould v. Tepeka*, 32 Kan. 485, 49 Am. Rep. 496, and the following conclusions reached: "The control of the streets of cities was not put into their hands for the purpose that they might plan or order that the streets should be made dangerous or unsafe for the public to travel thereon, nor was such control put into their hands for the purpose that they might plan or order that the streets should remain in an unsafe or dangerous condition if previously dangerous, but such control was given to them for the sole purpose that they should make and keep the streets safe and convenient for the traveling public; and we think it was put into their hands as a mandatory duty, which they have no right or discretion to evade or avoid. If a city should plan or arrange that a street should be made unsafe and dangerous, we should be inclined to think that it would so transcend its powers as given to it by the legislature, and so violate its duties as imposed upon it by the legislature, that it would be liable for any injury which might occur to any individual by reason of such unwise action. Such action would be substantially the same as planning and creating a public nuisance. Can a city, by planning that a cistern should be left uncovered in the middle of a public street, avoid all

liability for injuries that may occur by reason of some person's falling into it in the night-time, without fault on his part, when, on the other hand, it would be liable if the cistern were left uncovered by the person who constructed it, or was afterward uncovered by some other person, and notice of its condition had been given to the city officers? Is such a distinction founded in reason? 2 Thompson on Negligence, pp. 734, 735, 836, secs. 2, 3, and notes; pp. 766, 767, 768, and notes. After a careful consideration of this entire question, we have come to the conclusion that where a street as planned or ordered by the governing board of a city is so manifestly dangerous that a court, upon the facts, can say as a matter of law that it was dangerous and unsafe, the rule contended for by the defendant should not have any application, and the city should be held liable; but where, upon the facts, it would be so doubtful whether the street as planned or ordered by the governing board of the city was dangerous or unsafe or not, — that different minds might entertain different opinions with respect thereto, — the benefit of the doubt might properly be given to the city, or rather to its governing board that planned or ordered that the street should be placed in such a condition, and the rule should be held to apply, and the city should not be held to be liable."

The plan adopted need not be such as to prove adequate in extraordinary emergencies, which a prudent man might fail to anticipate without being guilty of want of reasonable care and forethought. Thus in an action to recover for injuries suffered from an embankment and culvert, and the flooding of the plaintiff's premises by water from the inadequacy of the culvert, the defendant asked that the jury be instructed as follows: "If the jury shall find that the damage complained of was occasioned by a flood of water so much more extraordinary than usual that ordinarily careful and thoughtful men and ordinarily skillful engineers would not contemplate that such a flood would ever come, and such embankment and culvert did prove sufficient for all purposes for about three years, the jury should find the damage to have happened by what, in law, is called the 'act of God,' and should find for the defendant." This instruction was refused, and the inference to be drawn from the instructions given, taken as a whole, was to the effect that "if the damage to the plaintiff happened in consequence of the improvement, the city is liable." The judgment of the trial court was reversed on the ground that the instruction asked for "was within the law, and should have been given": *City of Madison v. Ross*, 3 Ind. 236; 54 Am. Dec. 481; *Mayor of New York v. Bailey*, 2 Denio, 433; *City of Evansville v. Decker*, 84 Ind. 328; 43 Am. Rep. 86. Though a flood or fall of rain is so extraordinary that the municipality might have been exonerated from liability had the plan of its sewers proved inadequate for the discharge of all the water falling into them, yet if such plan was not in fact inadequate even for the extraordinary emergency which arose, the municipality is answerable to one whose property is damaged by the failure to keep the sewer as originally planned and constructed in proper repair; for whether the municipality was in law bound to plan and construct the sewer, and it did or not, after, if it was constructed, every property holder affected by it had the right to assume that it would be kept in repair, and that its capacity would not be materially diminished by the negligence of the municipal authorities: *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158.

Public Streets — Negligence, and not Injury, is the Test of Liability. — The mere fact that injury was occasioned by a street being out of repair, or sewer being inadequate, or not in proper condition, does not result in municipal

liability, unless it further appears from the attendant circumstances that the condition leading to the injury was a consequence of negligence. Thus where it was shown that a sewer had become obstructed during or immediately succeeding a heavy fall of rain, so that it could not carry off the waters running into it, and that, as a consequence, plaintiff's premises were flooded and damaged, it was held that he was not entitled to recover without some evidence of negligence or omission of duty on the part of the municipality. The ruling upon the subject and the reasons for it were thus expressed by the court: "It is found upon sufficient evidence that the overflow was caused by a stoppage of the sewer with sand, dirt, and refuse matter washed in from the street, and that at or just before the flooding of the plaintiff's premises there was an unusually heavy shower of rain. There is no proof of any obstruction before that time. There being no fault in the construction of the sewer, causing the overflow, it was incumbent upon the plaintiff to show a neglect by the defendants to remove the obstruction after notice of its existence, or some omission of duty on the part of the city officers in looking after it and seeing that no obstruction occurred. There was no evidence, and there is no finding, that the sewer was liable to become obstructed under ordinary circumstances, so as to require the watch and care of the officials to prevent its becoming filled and choked with the wash of the street, or that it had been obstructed for any time and under circumstances from which it might be assumed that the officers of the city did know or ought to have known the fact. The city does not insure the citizen against damage from works of its construction, but is only liable, as other proprietors, for negligence or willful misconduct. The principles upon which municipal corporations are held liable for damages occasioned by defects in streets and sewers and other public works are well settled by numerous cases, and the liability is made to rest, in any case, upon some neglect or omission of duty: *Barton v. Syracuse*, 37 Barb. 202; 36 N. Y. 54; *Griffin v. Mayor etc. of New York*, 9 N. Y. 456; 61 Am. Dec. 700; *McCarthy v. Syracuse*, 46 N. Y. 194; *Nims v. Troy*, 59 N. Y. 500": *Smith v. Mayor*, 66 N. Y. 295; 23 Am. Rep. 53.

In the *Grading of a Street*, a city is liable for negligence or unskillfulness from which injury results, to the same extent as if such injury had arisen, after the grading was completed, from a failure to keep the street in a safe condition: *Meares v. Commissioners*, 9 Ired. 73; 49 Am. Dec. 412; *Commissioners v. Wood*, 10 Pa. St. 93; 49 Am. Dec. 582. Where such negligence or unskillfulness does not exist, a municipality, having power to establish or change grades, and to improve streets in accordance with grades as established or changed by its common council or other competent authority, is not answerable for consequential damages resulting to property by means of such grading: *Green v. Borough of Reading*, 9 Watts, 382; 36 Am. Dec. 127; *Smith v. Corporation of Washington*, 20 How. 135; *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Shaw v. Crocker*, 42 Cal. 488; *Wilson v. Mayor of New York*, 1 Denio, 595; 43 Am. Dec. 719; *Mayor of Philadelphia v. Randolph*, 4 Watts & S. 514; 39 Am. Dec. 102; except in states whose constitutions prohibit the damaging of private property for public use without first making just compensation to its owner. The liability of cities for injuries resulting from the grading of streets, and from changes in the grades thereof, is considered in the note to *O'Brien v. Philadelphia*, 150 Pa. St. 589; *post*, p. 835; except that such note does not treat of claims for damages occasioned by the grading of streets in such a manner as to interfere with the flow of water.

Watercourses, Grading Streets so as to Interfere with. — It is often difficult to

determine whether a depression in which water flows is or is not a watercourse within the legal signification of that term, and it is not within the purpose of this note to furnish definitions or authorities to aid in the decision of that question. Whenever there exists in a city a natural watercourse, the authority given to the municipality to grade streets does not carry with it the right, by such grading, to deprive persons of their rights in such stream, by preventing its flow to or through their property, nor does it entitle the municipality to so grade its streets as to hold back the waters of the stream, or to collect them into new channels and throw them upon the lands of private proprietors who were not injured by it in its natural state. If a street extends across a watercourse, the municipality is not at liberty by grading the street to prevent or obstruct the flow of the water, and it must therefore provide, by culverts or other appropriate means, for the escape of the water, so that the rights of riparian proprietors shall not be substantially impaired and the adjacent lands shall not be flooded to a greater extent than would occur if such watercourse were left in its natural condition. If by reason of the failure of the municipality to provide proper culverts, injuries result, it must respond in damages therefor: *Helena v. Thompson*, 29 Ark. 569; *Noonan v. City of Albany*, 79 N. Y. 470; 35 Am. Rep. 540; *Barden v. Portage*, 79 Wis. 126; *Ross v. St. Charles*, 49 Mo. 509; *Barns v. Hannibal*, 71 Mo. 449; *Haynes v. Burlington*, 38 Vt. 350; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 316; *Wheeler v. Worcester*, 10 Allen, 591; *Kellogg v. Thompson*, 66 N. Y. 88; *Mootry v. Danbury*, 45 Conn. 550; 29 Am. Rep. 703; *Parker v. Lowell*, 11 Gray, 353; *Morse v. Worcester*, 139 Mass. 389; *Stanchfield v. Newton*, 142 Mass. 110; *Rice v. Evansville*, 108 Ind. 7; 58 Am. Rep. 22; *Powers v. Council Bluffs*, 50 Iowa, 197; *Richardson v. Eureka*, 96 Cal. 443. If, however, a city has undertaken to provide sufficient culverts, and to aid it in accomplishing that purpose has consulted an engineer of skill and of good repute, whose advice it has followed in good faith, it is doubtful whether it is liable for injuries resulting from his error of judgment: *Van Pelt v. Davenport*, 42 Iowa, 308; 20 Am. Rep. 622.

Surface Waters, Interference with, by Grading Streets. — Two opposing rules regarding the right to dispose of surface waters are still contending for supremacy in this country. According to one of them, the land-owner whose property is injured has a right to defend and protect his property by such means as to him shall seem fit, and may, therefore, by embankments, restrain such waters from flowing upon his land, or may, by drains, hasten their departure from his lands, though in either event injury may result to the land of another, unless he, in turn, takes some measure either to prevent the waters coming upon his land or to cast them off upon the lands of a third person. The other rule is sanctioned by the civil law, and is thus stated by Pothier: "Each of the neighbors may do upon his heritage what seemeth good to him, in such manner, nevertheless, that he do not injure the neighboring heritage." The application of this rule requires the owner of the lower heritage to receive such waters as naturally flow upon his land, whether by a natural watercourse or not, and not to resist their flow by embankments or other defenses tending to overflow and injure the lands of his neighbor above him, who, in turn, is prohibited from collecting the waters into new channels and casting them in unusual amounts or places upon the land of the neighbor below him: See note to *Martin v. Jett*, 32 Am. Dec. 123-127; note to *Shane v. Kansas City etc. R. R. Co.*, 36 Am. Rep. 490-492.

A somewhat similar divergence exists respecting the right of municipalities to deal with surface waters in grading and otherwise improving streets.

The weight of authority probably inclines to the view that as long as the grading is done under the sanction of the law, and pursuant to a power authorizing the municipality to adopt grades and to improve streets in accordance therewith, no liability can arise against it from the fact that the grading results in an injury to some private proprietor, either by damming up and detaining surface waters on his land or by throwing thereon surface waters from which it was before exempt; but this immunity of the city from claims for damages does not extend to its wrongful and intentional acts in concentrating surface waters and discharging them upon the lands of private proprietors to their injury: *Pye v. City of Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671; *O'Brien v. City of St. Paul*, 25 Minn. 331; 33 Am. Rep. 470.

Where there is no natural watercourse, but the surface waters, owing to the slope of the land, draw off in a particular direction, and by the grading of the street an embankment is made, which prevents this flow of waters, whereby they are held back upon and caused to overflow adjacent premises, the persons damaged are, in the majority of the states, without redress, though by the construction of culverts or drains injury might have been prevented: *Wilson v. Mayor of New York*, 1 Denio, 595; 43 Am. Dec. 719. In a case in New York the general principle was declared that the city had the same right to grade a street, and in so doing to erect an embankment that the owner of a lot would have to fill it in and raise it to such height as might make it more desirable, and therefore that the city cannot be held answerable, where a private proprietor would not be liable had he done a similar act. It is true that in this case there was no ground whatever for holding the municipality liable, and there was nothing to show that any injury had resulted to any one from any cause, and the opinion of the court, so far as it dealt with general principles, was therefore a *dictum*. Nevertheless, as it has been much relied upon in other cases, we quote it, so far as material: "The defendant had, at least, as much right to fill up and raise this avenue as a private owner of a city lot has to fill up and improve his lot; and there can be no question that such an owner may fill up his lot and build upon it, and the surface water of adjoining lots may thus be prevented from flowing upon it, or the surface water may be thrown from it upon adjoining lots, and flow upon them in a different way and in larger quantities than before, and yet no liability would arise. If it were otherwise, it would be quite difficult to improve city lots and build up a city. Each owner may improve his lot and protect it from surface water. He may not collect such water into a channel, and throw it upon his neighbor's lot. But he is not bound, for his neighbor's protection, to collect the surface water which falls upon his lot, and lead it into a sewer: *Vanderwiele v. Taylor*, 65 N. Y. 341; *Gannon v. Hargadon*, 10 Allen, 106; 87 Am. Dec. 625"; *Lynch v. Mayor of New York*, 76 N. Y. 60; 32 Am. Rep. 271. These views are in harmony with those pronounced in many other courts in which the question was necessarily involved: *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Flagg v. Worcester*, 13 Gray, 601; *Corcoran v. City of Benecia*, 96 Cal. 1; 31 Am. St. Rep.; *Waters v. Bay View*, 61 Wis. 644; *Henderson v. City*, 32 Minn. 319; and are perhaps a logical consequence of many other cases, which, while not involving the question of damages resulting from surface waters, affirm the general principle that in no event can a municipality be held liable for consequential damages resulting from the exercise, without negligence on its part, of an authority confided to it by law: *Wakefield v. Newell*, 12 R. L. 75; 34 Am. Rep. 598; *Smith v. Tripp*, 13 R. L. 152; *Gilfeather v. Council Bluffs*, 69 Iowa, 310; *Simmons v. City of*

Camden, 28 Ark. 276; *Dorman v. Jacksonville*, 13 Fla. 538; 7 Am. Rep. 253; *Keary v. Louisville*, 4 Dana, 154; 29 Am. Dec. 395; *City of Delphi v. Evans*, 36 Ind. 90; 12 Am. Rep. 12; *Smith v. Corporation of Washington*, 20 How. 135; *Lee v. Minneapolis*, 22 Minn. 13; *Humes v. Mayor of Knoxville*, 1 Humph. 403; 34 Am. Dec. 657; *White v. Yazoo City*, 27 Miss. 357; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Carr v. Northern Liberties*, 35 Pa. St. 324; 78 Am. Dec. 342.

In some instances the waters whose flow was arrested by the grading of a street had before that time been drawn off by depressions or ravines, and the contention was, that the city had become liable as for interference with a natural watercourse; but this liability was denied, unless the depression "in question had the proper qualities of, and constituted what is known in law as, a watercourse, as distinguished from a ravine, hollow, or other depression in land through which, in times of rains, heavy showers, and melting snows, the surface water is accustomed to escape. The term 'watercourse' is well defined. There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses: *Shields v. Arndt*, 4 N. J. Eq. 234; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Washburn on Easements*, 209, 210": *Hoyt v. City of Hudson*, 27 Wis. 656; 9 Am. Rep. 473.

On the other hand, there are cases which proceed upon the theory that while a city has the right to grade its streets, and is not answerable for injuries resulting from a prudent exercise of that right, yet that it is negligence on its part for it to close up drains or gutters which have been used to protect lands from the accumulation of surface waters, and that where, by grading a street, it fills up such drains without providing others, it is guilty of negligence, and therefore liable for resulting damages: *Smith v. City Council of Alexandria*, 33 Gratt. 208; 36 Am. Rep. 788. We find a number of other cases which we are unable to reconcile with the general principle that municipalities are not answerable for surface waters being held back or restrained upon lands from which, before the grading of the street, they escaped by natural or other depressions. In most of these, some attempt had been made by means of culverts or other appliances to carry off the waters otherwise retained by the grade, and damages were recovered for the insufficiency of such appliances, or negligence in not keeping them in proper repair; and perhaps it may be truly said that the liability of the city was not founded upon its obstruction by grading the street, and thereby arresting the flow of surface waters, but upon its negligence in not keeping in proper repair culverts and sewers planned and constructed by it: *Ross v. Clinton*, 46 Iowa, 606; 26 Am. Rep. 169; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reid*, 57 Ill. 30; 11 Am. Rep. 1; *Bloomington v. Brokaw*, 77 Ill. 194; *Elgin v. Kimball*, 90 Ill. 356; *Maguire v. Cartersville*, 76 Ga. 84; *Reid v. City of Atlanta*, 73 Ga. 523. The general language employed by the court in *City of Dixon v. Baber*, 65 Ill. 518, 16 Am. Rep. 591, does not, it is true, place the decision on the ground of the insufficiency of the sewers, though it is clear from the opinion that such

was the real cause of the injury. The court here said: "This was an action of trespass on the case, brought against the city, to recover damages for flowing surface water upon the lot of plaintiff, by the raising of the grade of the street and sidewalk. The proof shows that by the elevation of the grade of the street, on the part of the city, surface water flowed into the basement of the house of the plaintiff, and thereby the building was injured and the walls cracked. The broad ground is taken, that municipal corporations are not liable for damages caused by such flowage of the surface water, that the damages are incidental, and they are not liable for incidental damages. Before the change of the grade, the building of the plaintiff was two feet above the grade, and the gutters carried off all the surface water. After the change, the water ran over the sidewalk and into the cellar of the plaintiff. From the evidence, this might have been prevented by proper sewerage. If municipal corporations can raise the grade of streets at discretion, and not provide suitable gutters to carry off the surface water, and thus overflow the lands abutting upon the streets with impunity, then the owners of lots in our towns and cities are entirely at the mercy of the authorities of the municipality. They may make the premises unhealthful, or may compel the owners of the lots to incur great expense in raising the building to the grade established, or may wholly destroy the property for use. One owner of land has no right, by artificial structures, to turn the surface water from his land upon the land of another, when, without such structures, the flowage never would have taken place. The same principle which controls individuals must control as between towns and cities and individual proprietors. Municipalities hold the streets of towns in trust for the public, and may regulate and establish their grade, but this must be done so as to do no serious injury to owners of abutting lots. In *Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392, this question was fully considered and the authorities reviewed. It was there held that while a city has the absolute control over the grade of its streets, and may elevate or lower it at pleasure, yet it has no more power over the streets than a private individual has over his own land, and that its liability for injury to the property of another is the same as that of the private individual. It was further held that if, in the elevation of its streets, it turned water upon the ground and into the cellar of one of its citizens, it must respond in damages for the injury thus occasioned. That case is decisive of the plaintiff's right in this case, and there was no error in giving the plaintiff's first instruction. Error is assigned upon the refusal of the court to instruct the jury, in behalf of the city, that it was not liable for injuries resulting from error in judgment of the common council as to the size of the sewers necessary for the passage of the surface water. The evidence is overwhelming that the sewers were insufficient, and the common council might and ought to have known the fact. The city did not exercise reasonable care in their construction, and the instruction was properly refused": *City of Dixon v. Baker*, 65 Ill. 518; 16 Am. Rep. 591.

The Throwing of Surface Waters upon Lands, where they did not flow before, or though upon lands where they before ran, at a different place, or with increased velocity, or in much greater quantities, presents a case substantially different from the merely restraining of water by street embankments. When, as a result of the grading of a street, surface waters which before ran off upon the natural surface of the soil are collected together in one channel and thrown upon the lands of a private proprietor, who is damaged thereby, he may recover compensation therefor from the city: *Young v. Highway Comm'rs*, 134 Ill. 569; *Whipple v. Fairhaven*, 63 Vt. 221; *Pye v. City*

of *Mankato*, 36 Minn. 373; 1 Am. St. Rep. 671; *Nerins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Follmann v. Mankato*, 45 Minn. 457; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Muller v. Morristown*, 47 N. J. Eq. 62; 48 N. J. Eq. 645; *Selfert v. City of Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664; *Gillison v. City of Charleston*, 16 W. Va. 282; 37 Am. Rep. 763; *Hitchins v. Mayor of Frostburg*, 68 Md. 100; 6 Am. St. Rep. 422; *West Orange v. Field*, 37 N. J. Eq. 600; 45 Am. Rep. 670; *Field v. West Orange*, 46 N. J. Eq. 183; *Davis v. City of Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361; *Turner v. Dartmouth*, 13 Allen, 291; *Young v. Leedom*, 67 Pa. St. 351; *Blakely v. Devine*, 36 Minn. 53. Hence where a city causes the grade of a street to be changed by cutting it down, whereby surface water which had collected in a pond or natural reservoir was released and carried upon the premises of the plaintiff, flooding his cellar and well, and otherwise damaging him, he was entitled to recover: *Inman v. Tripp*, 11 R. I. 520; 23 Am. Rep. 520; *Pettigrew v. Village of Evansville*, 25 Wis. 223; 3 Am. Rep. 50. The fact that waters were concentrated by means of a culvert cannot sustain a recovery by a lot-owner upon whose lands they afterwards flowed, unless it appeared that by an increase in their quantity or force he suffered injury in excess of that he would have sustained had the waters been left in their natural condition: *Noble v. St. Albans*, 56 Vt. 522; *Rutherford v. Village of Holley*, 105 N. Y. 632. In Missouri we understood the decisions of the supreme court as declaring that no liability can accrue against a city for increasing the flow of surface waters by means of grading a public street as long as the plan adopted is carried out without negligence or want of skill, and therefore that if it is a part of such plan that waters shall be concentrated and thrown upon the lands of private proprietors, they are without legal redress: *Lambar v. St. Louis*, 15 Mo. 610; *St. Louis v. Gurno*, 12 Mo. 414. Speaking of evidence offered in support of a claim for damages, and determining that it did not support such claim, the court said: "It not only tended to show, but conclusively established, the fact that the work of grading and opening the said street in accordance with the plan was well and carefully, and not negligently, done, and that the injury to plaintiff's lots was not occasioned by any careless or negligent execution of the work in grading and opening said street which the ordinance authorized, but resulted from an error of judgment on the part of the city council in ordering the opening of a street at a certain grade without providing, in the plan and specifications for doing the work, some method of drainage for the disposition of the surface water. The passage of the ordinance establishing the grade of said street, directing it to be opened according to the plan and specifications, was quasi judicial, and the city is not liable for consequential damages arising from a defect in the plan adopted, but can only be held liable for damages resulting from the negligent execution of the work done in compliance with such plan": *Foster v. St. Louis*, 71 Mo. 157. Few, if any, of the courts of this country at the present time concur with these views. Their inclination would rather be to affirm that the fact that the plan necessarily involved the invasion of private rights of property was an unanswerable reason for holding the municipality liable for its execution. Even the supreme court of Missouri, as we understand its most recent opinion, has receded from the position formerly taken by it upon this question. In *Rychlicki v. City of St. Louis*, 93 Mo. 497, 14 Am. St. Rep. 651, the plaintiff, in his opening statement in the trial court, declared that he expected to prove that he was the owner of certain lands in the city of St. Louis, on the north side of which was a block of land separated from plaintiff's land by Page Avenue; that in opening and grading certain

streets, defendant diverted large quantities of surface water at the north line of the block referred to, and after conducting it by culverts and drains under the road-bed of Page Avenue, discharged it upon plaintiff's property, by reason of which six acres of such property was turned into a morass, and ruined for the purposes of cultivation; that the improvement upon the streets from which this damage resulted was done by virtue of city ordinances duly enacted. Upon this statement the plaintiff was nonsuited. Without attempting any explanation of the cases we have just cited, and also without expressly overruling them, the majority of the court reversed the judgment of nonsuit, declaring that "the question presented by this record is, whether the defendant may, in the construction of its streets, collect surface water, and then, by means of drains and conduits, discharge it in volume upon the land of an adjoining proprietor. From the authorities before cited, it makes no difference whether this particular question is tried by the rules of the civil law or by what is called the common-law rule. The result is the same; for either line of decisions rules this question against defendant."

Doubtless the grading of a street may to some extent increase the flow of surface waters upon contiguous premises without involving municipal liability, as where the waters flowing from a street as graded run upon and over premises which they did not before reach, or a street embankment or cut caused waters to escape somewhat more or less rapidly than before, or at a different point; but the proposition that waters may lawfully be concentrated and thrown upon the lands of private proprietors is no longer tenable. If a street is cut through a hill to conform it to the grade as established by a municipality, and by reason of such cut and corresponding cuts in other streets waters are discharged upon lands which they did not before reach, and in greatly increased quantities, the city is not answerable, for the reason that it has but pursued the authority vested in it by law, and has not concentrated surface waters by means of any culvert, artificial drain, or other appliance, and then cast them upon private property; but the rule is otherwise if the streets as cut reach a swamp or reservoir into which a natural watercourse flows, and thus result in draining its waters upon lands within the city: *Town of Union v. Durkes*, 38 N. J. L. 21. And, generally, when surface waters have not been concentrated by bringing them together in culvert or drains, and any change or increase in the flow thereof resulted solely from the grading of the streets, whether such grading consists of an embankment or cut, and not from a plan or device having in view the concentration or change in the place of discharge of surface waters, such injury as results is incidental and consequential, for which there is no redress by action against the city: *Miller v. Morristown*, 47 N. J. Eq. 62; affirmed 48 N. J. Eq. 645; *Field v. West Orange*, 46 N. J. Eq. 183; *Rychlicki v. St. Louis*, 98 Mo. 497; 14 Am. St. Rep. 651.

The Liability of a Municipality for a Nuisance created by its act or neglect is well established. In most of the cases in which any attempt has been made to prevent the enforcement of this liability, the immunity of the city has been placed upon the ground that the alleged nuisance arose from a defect in the plan of a street or of a sewer therein, and that as the adoption of such plan involved the exercise of judicial or legislative functions, no liability could result from an error in exercising them. Whenever the nuisance complained of results in the direct injury of property, the liability of the city cannot be escaped on the ground that the injury arose from a defect or error in the plan of the work, and not from negligence in its execu-

tion. Thus in New York, a sewer was planned and constructed with various lateral sewers connected with it, and the capacity of the main sewer was entirely inadequate to "carry off the accumulations of water and matter drawn into it, and the result was, that at times of heavy rain and melting snow, the collected sewerage, being obstructed in its flow, was forced through the man-hole, and inundated the district, involving serious injury to property." An action was brought by a person whose property was injured, and by way of defense it was insisted that as the damage complained of was occasioned by a defect in the plan of the sewer, the plaintiff was without redress. In overruling this defense, the court of appeals said: "We entertain no doubt as to the liability of the defendant for the damages occasioned by the defects of the sewer, and think it rests upon principles not conflicting with those announced in any reported case, but substantially in harmony with all of them. Municipal corporations have quite invariably been held liable for damages occasioned by acts, resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property had been occasioned: *Baltimore etc. R. R. Co., v. Fifth Baptist Church*, 108 U. S. 317. This principle has been uniformly applied to the act of such corporations in constructing streets, sewers, drains, and gutters, whereby the surface water of a large territory, which did not naturally flow in that direction, was gathered into a body, and thus precipitated upon the premises of an individual, occasioning damage thereto: *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587; 72 N. Y. 64; *Noonan v. City of Albany*, 79 N. Y. 470, 475; 35 Am. Rep. 540; *Beach v. City of Elmira*, 22 Hun, 158; *Field v. West Orange*, 36 N. J. Eq. 183; on appeal, 37 N. J. Eq. 600; 45 Am. Rep. 670. We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper: Wood on Nuisances, sec. 752. While in the present case the corporation was under no original obligation to the plaintiff or other citizens to build a sewer at the time and in the manner it did, yet, having exercised the power to do so, and thereby created a private nuisance on his premises, it incurred a duty, having created the necessity for its exercise, and having the power to perform it, of adopting and executing such measures as should abate the nuisance, and obviate damage: *Phinizy v. City of Augusta*, 47 Ga. 260, 263; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587; 72 N. Y. 64. It is a principle of the fundamental law of the state, that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation. The immunity which extends to the consequences, following the exercise of judicial or discretionary power, by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require

the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant. Where, however, the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences: *Radcliff v. Mayor etc.*, 4 N. Y. 195; 53 Am. Dec. 357; *Seifert v. City of Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664, 668. So in Missouri, where a system of sewers was so planned that it discharged the contents of the sewer into a small running stream of water near the plaintiff's residence, producing a sickening stench upon his premises, the city was held liable, the court saying: "Conceding full effect to the authority conferred by the city's charter to establish the system, yet it falls far short of legalizing the municipal acts here in question. The power granted was general. It did not expressly indicate and sanction the particular arrangement or plan adopted. Hence the power it has must be regarded as subject to the just limitation forbidding its exercise in such manner as to create a nuisance injurious to private rights of property, where such a consequence is not a necessary result of exercising the power": *Edmondson v. Moberly*, 98 Mo. 523; *Hughes v. Fond du Lac*, 73 Wis. 380; *Stoddard v. Saratoga Springs*, 127 N. Y. 261. Though a municipality in its control of school-houses and school property for most purposes exercises governmental functions, and for a negligence in their exercise cannot be held answerable, yet if it so fills in a school lot as to inflict injury upon the property of a private proprietor, it is answerable to him therefor: *Miles v. Worcester*, 154 Mass. 511; 28 Am. St. Rep. 264.

Though a city is liable for creating a nuisance whereby injury results to a citizen, a different result attends its failure to exercise powers which, if exercised, might have resulted in the prevention or abatement of a nuisance created within its limits and maintained upon private property, but to which neither it nor its officers contributed. Thus municipalities are usually given power to abate nuisances, and from the failure to assert such power nuisances may continue, and their continuance involve, either directly or indirectly, serious injury to private proprietors. The latter, however, are without means of redress by civil action against a city. The power of abating a nuisance, or of determining whether it shall be abated, is judicial, and the failure to exercise it, if not corrupt, cannot give any right of action to a person suffering injury therefrom: *James v. Harrodsburg*, 85 Ky. 191; 7 Am. St. Rep. 589; *Davis v. City Council of Montgomery*, 51 Ala. 139; 23 Am. Rep. 545; *Hill v. Charlotte*, 72 N. C. 55; 21 Am. Rep. 451; *Forsyth v. Atlanta*, 45 Ga. 152; 12 Am. Rep. 576; *Rivers v. Augusta*, 65 Ga. 376; 38 Am. Rep. 787. We are not able to reconcile with the principles here stated the decision in *Taylor v. Mayor of Cumberland*, 64 Md. 68, 51 Am. Rep. 759, affirming that the using of public streets for "coasting on the snow" is a nuisance, and that for want of diligence and vigor in suppressing it a city may be answerable. Possibly the judgment in this case, and that in *Mayor of Baltimore v. Marriott*, 9 Md. 160, upon which it was founded, may be sustained upon the principle that the city had assumed the duty of keeping the public streets within its limits free from danger, through its negligence, to persons lawfully using them, and that it had not performed this duty in those cases. In *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105, a city was sought to be held liable for injuries resulting to plaintiff from his horse being run into and injured by a vehicle "used in coasting, and called a bob," the use of such vehicle at the place where the injury occurred having been sanctioned

by a municipal ordinance permitting coasting on certain designated streets. Judge Cooley, in an able opinion, referring to the authorities upon the subject, reached the conclusion that as coasting was not necessarily a nuisance, the municipality might exercise a discretion in respect to permitting it, and could not be held liable, even though the discretion had been erroneously exercised.

Schools and School Property. — Cities, in holding and maintaining property used for public schools, as well as in performing all other duties imposed upon them in respect to such schools, are regarded as acting "with a sole view to the general benefit, and under the requirement or authority of general laws. In such cases, in the absence of any statute which directly or by implication gives a private remedy, no action lies in favor of a person who has received an injury in consequence of a negligent or defective performance of the public service": *Howard v. Worcester*, 153 Mass. 426; 25 Am. St. Rep. 651. Hence no recovery can be had against a city for injuries received by a child who attended a public school, by reason of the unsafe condition of a staircase or other part of a school-house: *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332; *Wixon v. Newport*, 13 R. I. 454; 43 Am. Rep. 35; or from a dangerous excavation in a school lot: *Finch v. Toledo Board of Education*, 30 Ohio St. 37; 27 Am. Rep. 414; *Flori v. St. Louis*, 69 Mo. 341; 33 Am. Rep. 504; *Bigelow v. Inhabitants of Randolph*, 14 Gray, 541; or for negligence in blasting rocks in excavating for the foundation of a school-house, by which a traveler was injured while lawfully using the public highway: *Howard v. City of Worcester*, 153 Mass. 426; 25 Am. St. Rep. 461. If the commissioners or other persons having the control of the public schools or of school property, though appointed by the mayor of the city, were "vested with full power and authority to manage and control the educational interests of the entire municipality, and to appoint all subordinate officers and employees, who were subject to their government and control exclusively, and were their servants and subordinates," and in the discharge of their duties are not amenable to the municipality in any respect, its liability may also be denied on that ground. Hence where the educational department is under the control of commissioners, and a part of a building leased by them, and occupied for a normal school, is allowed to get out of repair, by reason of which foul, dirty water is permitted to run down into the lower part of the building and to injure property there situated, there cannot be any recovery against the city: *Ham v. New York*, 70 N. Y. 459.

Fire Department. — Nearly all cities take some measures intended for the better protection of property from destruction by fire. These measures generally consist partly of means adapted to keeping on hand and furnishing an adequate supply of water, and partly in having a fire department with appliances to be used by it in extinguishing fires. The claim is often made that the plaintiff has suffered loss from the destruction of his property by fire which would not have occurred had the supply of water been adequate, or had the fire department, or some officer thereof, not been guilty of some negligence, and therefore that the city should be held answerable for the loss resulting from the negligence of itself or its officers or servants; and so far as we are aware, this claim has always been successfully met by the claim on the part of the city that in what it did it exercised discretionary governmental functions for the benefit of the public, and not for its private advantage, and therefore that it could not incur any liability. Hence its liability cannot be established by proof that loss resulted to plaintiff from its neglect in not providing a sufficient supply of water, or from shutting off the water

and not turning it on when required, or in failing to furnish proper cisterns, engines, or other appliances, or from any failure to assert or employ any power or authority vested in it by law: *Mendel v. Wheeling*, 28 W. Va. 233; 57 Am. Rep. 664; *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 338; *Black v. City of Columbia*, 19 S. C. 412; 45 Am. Rep. 785; *Robinson v. Evansville*, 87 Ind. 334; 44 Am. Rep. 770; *Nickerson v. Bridgeport H. Co.*, 46 Conn. 24; 33 Am. Rep. 1; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Tainter v. Worcester*, 123 Mass. 311; 25 Am. Rep. 90; *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444; *Grant v. Erie*, 69 Pa. St. 420; 8 Am. Rep. 272; *Foster v. Lookout Water Co.*, 3 Lea, 42; nor by showing any negligent act on the part of an officer of the fire department resulting in loss, either by contributing to the destruction of property by fire or the damage of the plaintiff in other respects: *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760; *Wilcox v. Chicago*, 107 Ill. 334; 47 Am. Rep. 434; *Wild v. Paterson*, 47 N. J. L. 406; *Burrill v. Augusta*, 78 Me. 118; 57 Am. Rep. 788; *Grube v. St. Paul*, 34 Minn. 402. Therefore he cannot recover on the ground that, through negligence of a person acting in the department, a collision occurred between a vehicle controlled by such person and a vehicle in which plaintiff was riding, or because plaintiff was negligently run over, and thereby suffered personal injuries: *Alexander v. Vicksburg*, 68 Miss. 564; *Hafford v. New Bedford*, 16 Gray, 297; *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Wilcox v. Chicago*, 107 Ill. 334; 47 Am. Rep. 434; or was hurt by the bursting of a hose: *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196; or by slipping and falling upon ice, resulting from water being permitted to escape from a hydrant: *Welsh v. Rutland*, 56 Vt. 228; 48 Am. Rep. 762; or by negligently maintaining a door in an engine-house, so that it opened upon and struck passing pedestrians: *Kies v. Erie*, 135 Pa. St. 144; 20 Am. St. Rep. 867. So municipal liability cannot be established by proof that the fire department, or some member thereof, needlessly or negligently caused the destruction of plaintiff's property, whether such destruction arose from the negligent management of some appliance or from a mistaken judgment in ordering the destruction of property to arrest an existing conflagration: *Dunbar v. San Francisco*, 1 Cal. 355; *Field v. Des Moines*, 39 Iowa, 575; 18 Am. Rep. 46; *Taylor v. Plymouth*, 8 Met. 462; *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760; *White v. Charleston*, 2 Hill (S. C.) 571; *McDonald v. Red Wing*, 13 Minn. 28.

Water-works. — It may be that water-works were owned by the city, and that it furnished water to its inhabitants for a compensation, and assumed in connection with such works the duty of having on hand an adequate supply of water and suitable hydrants and other appliances for use in extinguishing fires, and then the question arises whether the municipality, because of its deriving profit from its water-supply system, is answerable for the negligence or other wrong of its officers and servants acting within the scope of their duties. In performing the duty of supplying water for use in extinguishing fires, we think the authorities agree in denying municipal liability for negligence, whether it results in an inadequate supply of water or in causing the supply to be unavailing, owing to the absence or non-repair of some necessary appliance. This duty is governmental in its character, not undertaken for the benefit of the municipality, and cannot be performed without exercising quasi judicial or legislative functions out of the wrongful or negligent exercise of which it is universally conceded no liability, to a civil action can arise: *Mendel v. Wheeling*, 28 Va. 233; 57 Am. Rep. 664; *Black v. Columbia*, 19 S. C. 412; 45 Am. Rep. 785; *Robinson v. City of Evans-*

v. Harpswell, 87 Ind. 334; 44 Am. Rep. 770. If, however, through the neglect of an officer having control of the water-supply system, other injuries result, of a private nature, the authorities do not agree as to whether a city is answerable therefor or not. Thus in New Hampshire, where a horse was frightened by a stream of water thrown from a hydrant which was being tested by firemen, and an action was afterwards commenced to recover compensation for injuries received, and the claim was made that the persons in charge of the hydrant had been guilty of negligence which was the proximate cause of the injury to plaintiff, the right to recover was denied, partly upon the ground that the officers in charge of the hydrant "were public officers, amenable to law for their conduct, and not under control and direction of the city," and partly upon the ground that they were in the discharge of a public duty from which the city received no advantage. Upon this latter topic the court said: "It is claimed by the plaintiff that the act empowering the city to introduce water conferred special privileges on the defendants and their inhabitants, and is one from which the city, in its corporate character receives special benefits in the way of rents and tolls for the use of the water, and thereby the duty is imposed of protecting individuals from injury arising from a negligent use of the privileges so conferred. Conceding this to be so, it does not appear that the doctrine has any application to this case. The act from which the injury arose was the use of a hydrant with hose attached, constructed for use in extinguishing fires, and under the control of the fire department, an independent branch of the city government. No toll, or rent, or special advantage accrues to the defendants in their corporate capacity for the use of the hydrants for such purposes, but a tax is laid for supporting the use. For the use of the water by individuals, for domestic and other purposes, an annual rent is paid or may be exacted. The use of the water from the hydrants is a public use, enjoyed in common by the people, and from which the city in its corporate capacity receives no special advantage; and in the absence of a statute giving the action, the defendants cannot be made liable for any neglect of duty in respect to such public use": *Edgerly v. Concord*, 62 N. H. 8; 13 Am. St. Rep. 533. Perhaps, however, the weight of authority with respect to the liability of a city for negligence of its water commissioners, or other officers or agents intrusted with the duty of planning and keeping in repair a system of water, is affirmed and enforced under substantially the same circumstances as is the liability for negligence in performing the duty of keeping safe in condition the public streets, and therefore whosoever is injured in person or property by negligence in maintaining or operating such works, or in the use of water therefrom, or for negligence or want of skill in their construction or operation, may recover of the city for such injuries, unless they merely arise from negligence in relation to the public duty of furnishing water to extinguish fires. Hence an action may be maintained when injury has resulted from negligence of the water commissioners, whereby a public highway was made unsafe: *Aldrich v. Tripp*, 11 R. I. 141; 23 Am. Rep. 434; *Hand v. Brookline*, 126 Mass. 324; or land was flooded by a dam breaking, through want of skill in its construction: *Bailey v. Mayor of New York*, 3 Hill, 531; 38 Am. Dec. 669; or workmen were injured by negligently omitting precautions for their safety: *Connolly v. Waltham*, Mass., May 10, 1892; 31 N. E. Rep. 302. In a case in which a city was sued to recover for damages arising from the death of plaintiff's intestate from drinking impure and unhealthful water from a public well belonging to the defendant, and in which its liability was denied on the ground that it had not been guilty of negligence, the court assumed that had

negligence existed, liability to respond in damages might have resulted, saying "The city was not an insurer of the quality of the water, and bound under all circumstances to keep it pure and wholesome. This is not claimed. It owned this well as it owned its other property kept for public use, such as streets, parks, and public buildings; and it owed the duty of reasonable diligence to care for it as it was bound to care for such other property": *Dana-ker v. City of Brooklyn*, 119 N. Y. 250.

Police Department. — Municipal corporations are usually required by their charters or by general law, and sometimes by both, to have a police department, and by its aid to promote public health and morals, to better provide for personal security and the preservation of rights of property, and to suppress crime by watchfulness and skill, both by preventing its commission and by apprehending and punishing those who commit it. All these duties are clearly of a public character, and so far as we are aware, no city has ever been held answerable for any wrong or negligence on the part of the officers to whom their performance is deputed. The city is not liable for injuries suffered from the inadequacy of its police force, whether resulting from its not calling into its service a sufficient number of men, or from the negligence or inattention of those whom it engages in such services: *Hannon v. Agnew*, 96 N. Y. 439; *Dewey v. Detroit*, 15 Mich. 307; *Odell v. Schroeder*, 58 Ill. 355; *Prather v. Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585; *Worley v. Columbia*, 88 Mo. 106; *Lafayette v. Timberlake*, 88 Ind. 330. Nor is a municipality answerable for any wantonness, recklessness, or other wrong committed by a policeman while in the discharge of his duty. He is regarded as an agent or servant of the law, or of the state, rather than of the city, and hence it is not responsible for his acts. "Police-officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police-officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties, the city or town cannot be held liable": *Buttrick v. Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Burch v. Hardwicke*, 30 Gratt. 24; 32 Am. Rep. 640; *Calwell v. City of Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Bowditch v. Boston*, 101 U. S. 16; *Atwater v. Baltimore*, 31 Md. 462; *Elliott v. Philadelphia*, 75 Pa. St. 347; 15 Am. Rep. 591; *Norristown v. Fitzpatrick*, 94 Pa. St. 121; 39 Am. Rep. 771; *Campbell v. Montgomery*, 53 Ala. 527; 25 Am. Rep. 656; *Peters v. Lindsborg*, 40 Kan. 654. Therefore, a city is not liable for the use of excessive force by its policemen, or for their assault or battery upon, or shooting, or other abuse of, a prisoner or other person: *Buttrick v. Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Calwell v. City of Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810; *Whitfield v. Paris*, 84 Tex. 431; 31 Am. St. Rep.; nor for their unlawful seizure of property, whereby, or through their negligence, it is lost or misappropriated: *Elliott v. City of Philadelphia*, 75 Pa. St. 547; 15 Am. Rep. 591; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Dargan v. Mayor of Mobile*, 31 Ala. 469; 70 Am. Dec. 505; *Stewart v. City of New Orleans*, 9 La. Ann. 461; 61 Am. Dec. 218. Nor is it material that the policeman for whose wrongful act compensation is sought was acting under a municipal ordinance, and in an attempt to enforce its provisions, or to apprehend one

accused of violating them. "The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police-officers act in their public capacity, and not as agents or servants of the city": *Buttrick v. Lowell*, 1 Allen, 172; 79 Am. Dec. 721; *Cahwell v. City of Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810.

A *City Jail or Other Prison* is usually in charge of policemen, and in providing and keeping it in repair a municipality manifestly exercises duties of the same public character as when it provides a police department. If any policeman or officer should be guilty of mistreatment of a prisoner, the city must be exonerated from liability, under the authorities already cited granting it immunity from liability for acts of policemen. So in providing a prison and keeping it in repair, and furnishing supplies for its inmates, it exercises discretionary governmental functions, and is therefore not answerable to one who is injured in health or otherwise by the condition of the prison or the failure to furnish proper supplies to the persons confined therein: *Le Clef v. Concordia*, 41 Kan. 323; 13 Am. St. Rep. 286; *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810; *Governor v. Clark Co.*, 19 Ga. 97.

In the *Maintaining of Almshouses, Hospitals, and Workhouses*, and in providing for the welfare and support of indigent persons, and for the advancement of public health, municipalities also exercise discretionary governmental functions, and are therefore not answerable in a civil action for their negligence, nor for that of their officer or agents. Hence there can be no recovery against a city on the ground that its health-officers negligently exposed plaintiff to a contagious disease: *Ogg v. City of Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; *Brown v. Vinalhaven*, 65 Me. 402; 20 Am. Rep. 709; or after cleaning a vault on private premises, left it open, in consequence of which plaintiff, without fault on his part, fell into it and was injured: *Bryant v. St. Paul*, 33 Minn. 289; 53 Am. Rep. 31; or without authority took possession of a dwelling-house, to the exclusion of its owner, and used it as a hospital: *Spring v. Hyde Park*, 137 Mass. 554; 50 Am. Rep. 334; *Lynde v. Rockland*, 66 Me. 309, 314. A municipality, not guilty of negligence in selecting a physician or surgeon for the poor, or for the inmates of a hospital or other public institution, is not answerable to one injured by his negligent or unskillful treatment: *Summers v. Board of Comm'rs*, 103 Ind. 262; 53 Am. Rep. 512; *Sherbourne v. Yuba Co.*, 21 Cal. 113; 81 Am. Dec. 151. And, generally, for any wrongful act or neglect of an officer or employee in any city hospital, almshouse, or other charitable institution, there can be no recovery except against him personally: *Mulcairne v. Janesville*, 67 Wis. 24; *Richmond v. Long*, 17 Gratt. 375; 94 Am. Dec. 461; *Murtaugh v. St. Louis*, 44 Mo. 479, 481; *Heriot's Hospital v. Ross*, 12 Clark & F. 507; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Benton v. City Hospital*, 140 Mass. 13; 54 Am. Rep. 436; *Perry v. House of Refuge*, 63 Md. 20; 52 Am. Rep. 495; *Maximilian v. New York*, 62 N. Y. 160; 20 Am. Rep. 468; *Haight v. New York*, 24 Fed. Rep. 93; *Curran v. Boston*, 151 Mass. 505; 21 Am. St. Rep. 465.

If a *City has Property, or Engages in an Undertaking the Object of Which is Profit to itself*, its liability with respect to such property or business is the same as if it were a private corporation: *Bailey v. Mayor*, 3 Hill, 531; 38 Am. Dec. 680; *Clark v. Manchester*, 62 N. H. 577. Hence if it rents a building or some

portion thereof, it becomes answerable for negligence in respect to the building and its appurtenances, and the streets and approaches thereto, to the same extent as the owner of other property used for private purposes: *Worden v. New Bedford*, 131 Mass. 23; 41 Am. Rep. 185; *Mayor of Savannah v. Culens*, 38 Ga. 334; 95 Am. Dec. 398. If it owns water-works, and undertakes to supply an inhabitant with water for some specified purpose, and uncovers a pipe by which he receives such water, so that it is frozen and his supply cut off, the city is answerable in damages: *Stock v. Boston*, 149 Mass. 410; 14 Am. St. Rep. 430; though, in one state at least, such damage is limited to the amount paid for the use of the water: *Smith v. Philadelphia*, 81 Pa. St. 38; 22 Am. Rep. 731.

Wharves, Piers, etc., Negligence in Management of. — A city owning or in possession of a wharf or pier, for the use of which it is authorized to collect, and does collect, tolls, is charged with the duty of keeping it in proper and safe condition and repair in its capacity of owner and manager of private property, and is answerable to any one injured by its failure to perform such duty, in all cases in which its non-performance is attributable to negligence: *Pittsburgh v. Grier*, 22 Pa. St. 54; 60 Am. Dec. 65; *Shinkle v. Covington*, 1 Bush, 617; *Pennimore v. New Orleans*, 20 La. Ann. 124; *Alleyheny v. Campbell*, 107 Pa. St. 530; 52 Am. Rep. 478; *City of Petersburg v. Applegarth*, 28 Gratt. 321; 26 Am. Rep. 357; *Memphis v. Kimbrough*, 12 Heisk. 133.

In South Carolina, a municipality was authorized to issue, and did issue, certain certificates of stock, each of which contained a provision "that the demand evidenced thereby was recorded in and transferable only at the office of the city treasurer by appearance in person or by attorney according to the rules and forms instituted for that purpose," and it was held that the municipality had, in effect, entered into a contract with persons interested in the stock that the same should not be illegally transferred, and was therefore answerable to any one injured through its violation of such contract by its permitting an unauthorized transfer of the stock to be made: *Chapman v. Charleston*, 28 S. C. 373; 13 Am. St. Rep. 681.

Test of Liability is, Was the Duty Municipal? — The negligence or omissions which we have referred to, and for which municipalities have been held answerable, occurred in performing or failing to perform some duty which the city had taken upon itself, or which had been imposed upon it, and with the performance of which it became charged as a corporate duty, rather than as an instrumentality of the sovereign power acting for the benefit of the public. We confess that it is not always possible to determine from the decisions when a municipality is acting in one capacity, rather than in the other, but the only principle upon which it can in any instance be held answerable is, we submit, that it has, by its voluntary act, in accepting its charter, or by some general law, become answerable for the performance of some duty, and that from its proper performance it cannot escape on the ground that, by its own act, or by the law, such performance has been delegated to some officer or agent. If a duty is not a duty of the municipality, but merely of some of its officers, then no liability can attach against it. Thus if a city surveyor is called upon to make a survey for a private proprietor, and to establish the boundary line of his lot, the officer, though the charter of the city may give him authority to act, does not act for it, nor in the discharge of a corporate duty, and it cannot be held liable for damages resulting from his error or want of skill: *Alcorn v. Philadelphia*, 44 Pa. St. 348. If, on the other hand, the officer from whose negligence injury has resulted was acting in the discharge of a corporate duty, as distinguished

from a discretionary governmental duty, the city is liable. This is an essential test. The fact that the officer was not appointed by the municipality, or cannot be discharged or controlled by it, is often spoken of as material; but if material, it is so only because it may aid in determining whether or not the duty was a corporate one; but if it be conceded to be of the latter character, the liability of the city is generally enforced, though it has not appointed and cannot control him. Thus in an action against the city of New York to recover for damages suffered from the unsafe condition of a public street, it resisted recovery, on the ground that the injury complained of arose from the negligence of the commissioners of public parks. To this defense the court responded, that, conceding the duty to have been devolved upon these commissioners, it was still a municipal duty; that "the city must act through its officers and agents, and it is for the legislature to determine what powers and duties shall be devolved upon them. It matters not how independently they may act, nor how they are chosen. If they are provided by law and authorized to discharge a corporate duty which rests upon the municipality, then in the discharge of that duty they represent the municipality, and it may be chargeable with their misfeasance or non-feasance. The exclusive control of the streets may by law be confided to the mayor or the street commissioner, free from the control of the common council, and yet the care of the streets would remain a municipal duty, discharged by the officers designated for and in behalf of the city": *Ehrgott v. New York*, 96 N. Y. 264, 273; 48 Am. Rep. 622. In another case in the same state, the defense was, that the dangerous condition of the street from which plaintiff suffered injury was due to the act of the board of water commissioners of the city, created by a special statute defining their duties. In overruling this defense, the court of appeals said: "The board exists solely for the benefit of the city. It can own no property, and do no act that has not reference to the well-being of the city. It is given the power to purchase and acquire land, but the title, when acquired, vests in the city. For its contracts the city is liable, and judgments recovered against it are judgments against the city. When the water rents collected by it are more than sufficient to meet its expenses, the surplus must go to the benefit of the city. It is denominated the 'board of water commissioners of the city of Yonkers.' It is not an independent body acting for itself, but is a department of the city, and one of the instruments of the municipal government. Being such, when engaged in digging the trench for the purpose of laying water-pipe in Yonkers Avenue, it was engaged in the discharge of a municipal duty, and it was obligatory upon it, in so doing, to so protect and guard the work that it should not endanger persons using the street, and if that was impossible, with a due and diligent prosecution of the work, the street should, by suitable barrier, have been closed against the public. For its failure so to do, and for injuries resulting from such failure, the defendant is liable": *Pettengill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442. The leading case upon this subject is *Barnes v. District of Columbia*, 91 U. S. 540. The question there involved was, whether the plaintiff could recover for injuries resulting "in consequence of the defective condition of one of the streets of the city of Washington." The statute creating the defendant a municipal corporation, after giving it power to sue and be sued, and to exercise all other powers of a municipal corporation not inconsistent with the laws and constitution of the United States, and the provisions of the statute authorized the President, with the consent of the Senate, to appoint a board of public works, who should have entire control of and make all needful regulations which should be necessary for

keeping in repair the streets, avenues, alleys, and sewers of the city. After affirming that the duty of keeping the streets in repair was essentially a municipal duty, and that its negligent performance usually resulted in municipal liability, the supreme court of the United States proceeded to consider whether or not the fact that the duty was by a statute intrusted to a board of public works exonerated the municipality from negligence in its performance. "A municipal corporation," said that court, "may act through its mayor, through its common council, or its legislative department, by whatever name called, its superintendent of streets, commissioner of highways, or board of public works, provided the act is within the province committed to its charge. Nor can it, in principle, be of the slightest consequence by what means these several officers are placed in their position, — whether they are elected by the people of the municipality, or appointed by the President or a governor. The people are the recognized source of all authority, state and municipal, and to this authority it must come at last, whether immediately or by a circuitous process."

Torts, Generally. — We have heretofore considered the liability of municipal corporations for negligence in the performance or non-performance of some corporate duty. We now wish to treat of their liability for torts of a more active and intentional character. Sometimes doubt has been expressed concerning the liability of municipal corporations for torts, but if any doubt upon this subject ever existed, its existence has long since ceased: *Anthony v. Inhabitants of Adams*, 1 Met. 284; *Sewall v. St. Paul*, 20 Minn. 511; *Allen v. Decatur*, 23 Ill. 332; 76 Am. Dec. 692; *Wilde v. New Orleans*, 12 La. Ann. 15; *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 299; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Thayer v. City of Boston*, 19 Pick. 511; 31 Am. Dec. 157. Whenever liability exists, it must necessarily be for the act of an officer or agent, for except through officers or agents, a municipality cannot act at all. In an action against a city for a tort it may defend with success, — 1. By showing that the act complained of was as to it *ultra vires*, and therefore, in contemplation of law, could not have been its act; and 2. By proving that the officer or other person by whom it was done was not, in doing it, the agent of the city.

Torts, Ultra Vires. — The defense of *ultra vires* exists when the act complained of as wrongful was wholly beyond the powers of the corporation, or in other words, when it was not possible for the corporation, under any circumstance, to have authorized the doing of the act. Thus if a city, having no power to enact, under any circumstance, a valid ordinance giving a firm a monopoly of the slaughtering of animals, attempts to enact such ordinance, and its officers undertake to enforce it, no municipal liability can result: *City of Chicago v. Turner*, 80 Ill. 420. A law which is void because it conflicts with the constitution of the state, and a municipal ordinance which is void because the laws of the state do not permit the municipal authorities to enact and enforce it, stand upon the same ground, and any act done in the attempted enforcement of either is *ultra vires*, and the only liability resulting is against the persons who did or attempted to do it: *Mayor of Albany v. Cunliff*, 2 N. Y. 165; *Worley v. Inhabitants of Columbia*, 88 Mo. 106; *Brown v. City of Cape Girardeau*, 90 Mo. 377; 59 Am. Rep. 28; *Cuyler v. Rochester*, 12 Wend. 165; *Lemon v. Newton*, 134 Mass. 476; *Trammell v. Russellville*, 34 Ark. 106; 36 Am. Rep. 1. Hence where the common council of a city, by its vote, directed that a dam be erected on the land of a private citizen for the purpose of flooding it, and thereby abating an alleged nuisance, and such dam was

accordingly built, it was held that the municipality was not liable for the consequent damages to the owner of the land, because "the acts done having been beyond the authority and power of the city to do, the city cannot be held answerable in damages for that which was done under the supposed authority of illegal and void votes": *Cavanagh v. Boston*, 139 Mass. 426; 52 Am. Rep. 716; *Seele v. Deering*, 79 Me. 343; 1 Am. St. Rep. 314. If the officers or employees of a municipality, whether pursuant to a vote of its common council or not, engage in an act which the latter had no power to authorize, they are not, while so engaged, the representatives of the municipality, and it is therefore not liable for their negligence or misconduct. Therefore, if the fire department is directed to participate in a celebration when there is no authority to so direct it, or a vote to raise a committee to celebrate a holiday is so taken as to be void, no municipal liability can result from the misconduct or negligence of persons acting under the void order of the city council: *Smith v. City of Rochester*, 76 N. Y. 506; *Morrison v. City of Lawrence*, 98 Mass. 219. Where an act, because it is *ultra vires*, cannot be authorized in advance of the doing of it, it is impossible to ratify it, and therefore the liability of a city cannot be sustained for injuries growing out of such act by showing that it was ratified subsequently to its commission: *Horn v. Baltimore*, 30 Md. 218. There are a few cases apparently in conflict with the principles we have stated. Thus municipalities undertaking, by the resolutions of their common councils, to authorize the placing and keeping of obstructions or dangerous objects in a public street have been held liable for resulting damages: *Cohen v. Mayor of New York*, 113 N. Y. 532; 10 Am. St. Rep. 506; *Stanley v. Davenport*, 54 Iowa, 463; 37 Am. Rep. 216. But these decisions are defensible on the ground that it was the duty of the municipality to keep the streets in a safe condition, and it was equally answerable for their condition after notice thereof, whether it attempted to license their obstruction or not. A case decided in Georgia we are unable to reconcile with the other authorities upon this subject. It was an action against a city, the complaint in which alleged that the mayor and common council had passed a resolution declaring that plaintiffs were itinerant and non-resident speculators and traders within the meaning of a certain tax ordinance of the city, and had directed the clerk of the city council to issue execution to collect taxes claimed to be due from plaintiffs as such non-residents, and that the purpose of such resolution was to protect merchants of the city from competition in business, and that execution was accordingly issued and levied upon plaintiffs' property. There was no claim that in passing the resolution the common council were acting within the limits of any authority delegated to them, and yet it was held that the complaint stated a cause of action. The court, however, in its opinion, did not consider any question except that of the right of the plaintiffs "to transact business in Atlanta without any hostile proceedings against them founded upon the mere fact of non-residence": *Gould v. Atlanta*, 60 Ga. 164.

Unlawful Acts Which are not Ultra Vires. — If the wrongful act in question is one which the municipality had the right to do under some circumstances or in some manner, then it is not *ultra vires*, though done in different circumstances or in a different manner; and if authorized by the city, a recovery may be had at the instance of one injured thereby, as where a road is authorized to be constructed in a particular manner and out of designated materials, but it is constructed in a different mode and with other materials: *Pekin v. Newell*, 26 Ill. 320; 79 Am. Dec. 378. If a city has invaded the rights of private proprietors by a trespass upon their property or by any

other actionable tort, it is not always, nor usually, a sufficient answer to say that if the act was wrongful and unlawful, then the city was not authorized to do it, and it is not the act of the city. If such were the case, municipal liability for tort could not exist. If a municipality, acting by its common council or other governing body, determines to do an act, and commits the duty of doing it to some officer or agent, and the act was one which it had power to authorize, he and the municipality occupy substantially the relation of principal and agent, and hence it is answerable at least for such torts as he commits while acting in good faith, in the exercise of the power confided to him: *Soulard v. St. Louis*, 36 Mo. 546. "When officers of a town, acting as its agents, do a tortious act with an honest view to obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done. The contrary doctrine would be injurious to the person damaged and to the agents employed by the town. It would also be injurious to the town, by paralyzing the energies of such agents or officers, as they would be likely to refuse to act when prompt action is important": *Hawks v. Charlemont*, 107 Mass. 417. Therefore a municipality is liable if it authorizes its selectmen to repair a highway, and in so doing they enter upon private property without the consent of the owner, and take away stone to be used in repairing a bridge: *Hawks v. Charlemont*, 107 Mass. 417; or if a warden or other officer, acting under a vote of the burgesses or town council requiring him to remove an encroachment from a public highway, causes a fence, which he in good faith believed to be on such highway, to be removed therefrom, when it was not thereupon, nor was it an encroachment: *Weed v. Greenwich*, 45 Conn. 170; *Woodcock v. City of Calais*, 66 Me. 234; *Lee v. Sandy Hill*, 40 N. Y. 442; *Sheldon v. Kalamazoo*, 24 Mich. 383. And whenever a city directs a street to be opened, or other public work to be done, and sends a force to do it, and in so doing enters upon private property, without first acquiring the right to do so by proceedings in the exercise of the right of eminent domain, or by some other appropriate proceeding, it is guilty of a trespass for which it must respond in damages: *Hildreth v. Lowell*, 11 Gray, 349; *Hickerson v. Mexico*, 58 Mo. 61; *Soulard v. City of St. Louis*, 36 Mo. 546; *Allen v. City of Decatur*, 23 Ill. 332; 76 Am. Dec. 692; *Sewell v. St. Paul*, 20 Minn. 511. The result of the authorities upon this subject was thus forcibly stated by Judge Cooley: "It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility, where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon its land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction": *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Rhodes v. City of Cleveland*, 10 Ohio, 159; 36 Am. Dec. 82; *Goodloe v. City of Cincinnati*, 4 Ohio, 500; 22 Am. Dec. 764. Hence where a city, authorized to change the grade of a street upon certain contingencies only, and upon making compensation to

any lot-owner damaged thereby, proceeds to change the grade, and to grade the street accordingly, in the absence of such a contingency, and without complying with the requirements of the law or compensating the owner, he may recover damages from the city by an appropriate action: *Trustees of Diocese of Iowa v. City of Anamosa*, 76 Iowa, 538. A city, acting by its agents, purchased certain broken rock, and entered upon the land where it was lying and removed it. The vendor of the city, however, had no title to the property, and hence an action was brought against the city by the true owner of the rock. It was argued for the defendant "that as the city had no authority under its charter to commit a trespass, or to order the commission of a trespass, an order to its servants to do an act which, when performed, constituted a trespass, would not make the city liable, as both the order and the act would be *ultra vires*." To this the court replied: "This argument fails to distinguish between the doing of an act in its nature unlawful or prohibited, and the doing of an act in its nature lawful and authorized at an unauthorized place or in an unlawful manner. On the defendant's theory, municipal corporations could never be held liable for negligent or tortious acts of their agents and servants. As they have no authority to do wrong, and cannot authorize their officers or servants to do wrong, therefore it is argued they can never be held liable for injuries inflicted by them. This is an unwholesome doctrine, and is not supported either by reason or authority": *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 299. Another case in the same state is somewhat more extreme in character. A city being authorized to purchase a pest-house, its physician and police took possession of plaintiff's premises without authority, and used them for the purposes of the pest-house for the period of two months, after which an action was brought for the trespass involved in this seizure and use of the property. The defendant contended that as it was not authorized to acquire property for use as a pest-house except by purchase, its occupancy of plaintiff's premises was *ultra vires*. The court replied that as the property was taken for a purpose sanctioned by the charter, and as everything was done in accordance with the charter, except the acquisition of the title, the act was not *ultra vires* in such a sense as excluded municipal liability: *Dooley v. City of Kansas*, 82 Mo. 444; 52 Am. Rep. 380; *Sheldon v. Kalamazoo*, 24 Mich. 383.

Wrongful Acts not Authorized by the Municipality. — In all the cases cited in the preceding paragraph, the wrongful acts were committed under such circumstances as showed them to have been authorized or ratified by the city council, and they were therefore, to all intents and purposes, the acts of the city, done in good faith under a claim of right. We are now to consider that class of cases in which it appears that the wrongful act was committed by an officer of the city acting in good faith, but nevertheless not authorized by law to do what he did, nor authorized by the city itself, unless the fact that he was its officer, acting in good faith, may be treated as equivalent to such authorization. If the common council deposes the performance of certain work to specified persons, whether they happen to be officers of the corporation or not, and those persons in doing such work, but acting in good faith, commit a trespass upon the lands of a private proprietor, they may still be regarded as the agents of the city, and it is responsible for the trespass, though it did not authorize the particular unlawful act in controversy: *Platzer v. Seymour*, 86 Ind. 323; *Conniff v. San Francisco*, 67 Cal. 45; *Waldron v. Haverhill*, 143 Mass. 582. When an officer of a municipality has no other authority than that intrusted to him by law, and he acts beyond that authority, and commits a tort, whereby a citizen is injured either in person or

property, the tort is the act of the officer only, and ordinarily no recovery of damages can be had, except against him: *Board of Trustees v. Schroeder*, 58 Ill. 353; *Oooney v. Town of Hartland*, 95 Ill. 516; *Horn v. Mayor of Baltimore*, 20 Md. 218; *Sherman v. City of Grenada*, 51 Miss. 186; *Danovan v. Jones*, 36 N. H. 248; *New York etc. Co. v. City of Brooklyn*, 71 N. Y. 580; *Donnelly v. Tripp*, 12 R. L. 97; *Pierce v. Tripp*, 13 R. L. 181; *Rowland v. City of Gallatin*, 75 Mo. 134; 42 Am. Rep. 395; *Walling v. Shreveport*, 5 La. Ann. 660; 52 Am. Dec. 608. The rule upon this subject was thus formulated by Chief Justice Shaw in a leading case: "As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate, or that, in either case, the act was adopted and ratified by the corporation": *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157; *Mitchell v. Rockland*, 41 Me. 363; 63 Am. Dec. 252; *Caspary v. Portland*, 19 Or. 496; 20 Am. St. Rep. 842. Therefore, if the mayor of a city, having no power to contract for the removal of dead animals, enters into a contract for the removal of such animals, the municipality cannot be held liable for damages arising from the depositing by the contractor of carcasses upon private property: *Hilsdorf v. City of St. Louis*, 45 Mo. 94; 100 Am. Dec. 362.

In attempting to specify the cases in which municipalities are not answerable for the torts of their officers, Judge Shaw, in the extract quoted in the last paragraph, mentioned as among the contingencies in which cities are liable, those in which torts are committed by their officers or agents, acting *bona fide*, "in pursuance of a general authority to act for the city on the subject to which they relate." This limitation, while perhaps not inaccurately expressed, is, we think, misleading, because it is likely to create the impression that every officer, as to matters falling within his department, acts in pursuance of a general authority to act for the city; or in other words, that if a street superintendent does anything in relation to public streets, or a tax collector in relation to the collection of taxes, the city must be answerable therefor, because of the general authority over the streets in the one case and the collection of taxes in the other. Such is not the law, nor is it within the meaning of the learned jurist we have quoted. For unless by law or the action of the city discretion is vested in the officer or agent to determine how he shall act, his act, though apparently falling within his department, is but his personal act, for which he alone is answerable if it is contrary to law. We have already shown that officers of the street department have no authority to go upon private property and take material therefrom, though for the purpose of using it upon the public streets, and that therefore such officers alone are liable: *Rowland v. Gallatin*, 75 Mo. 134; 42 Am. Rep. 395. But if the city, by a resolution of its common council, had authorized them to do what they did, the result would be otherwise: *Buffalo etc. T. Co. v. Buffalo*, 58 N. Y. 639. The clerk of a common council may by law be vested with authority to issue warrants to persons for such sums as may be allowed by such council or by law, but this authority can in no way inculpate the city in or make it liable for his wrongful act in issuing warrants for other sums, or in altering them after they are issued: *Chandler v. Bay St. Louis*, 57 Miss. 327. If an officer or employee is charged by law or the municipality with the duty of serving writs or warrants under which, in proper cases, he is entitled to seize property or arrest persons, his seizure or arrest,

without authority and without the previous direction or subsequent ratification of the city, does not create any liability against it: *Fox v. Northern Liberties*, 3 Watts & S. 103; *Everson v. Syracuse*, 100 N. Y. 577; *Corsicane v. White*, 57 Tex. 382; *Thomas v. Grafton*, 34 W. Va. 282; 26 Am. St. Rep. 924. So for the acts of an assessor or collector of taxes, as where the latter levies upon property not subject to levy under his warrant, the municipality is not answerable, unless it directed him to do what he did: *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *Wallace v. Menasha*, 48 Wis. 79; 33 Am. Rep. 804. If, however, the common council of the city undertakes to make an assessment for damages and benefits in a case where they are authorized to do so, but the assessment is void for some reason, and the collector in what he does is, in effect, acting by the authority of the city, then it is answerable for his acts: *Horton v. Newell*, R. L. Jan. 2, 1892; 17 R. L.; *Durkes v. Kenosha*, 59 Wis. 123; 48 Am. Rep. 480; *Howell v. Buffalo*, 15 N. Y. 512; *Bank of Commonwealth v. New York*, 43 N. Y. 184. If, on the other hand, certain officers are by law authorized or required to abate nuisances, and they proceed in good faith to abate an alleged nuisance, any person injured by their acts may recover of the municipality, if he can show that no nuisance in fact existed, because the officers in what they did were acting under a general authority to act for the city: *Americus v. Mitchell*, 79 Ga. 807. So where the officers of the executive department of a city prevented the laying of a railway track under a claim that the time allowed by the ordinance within which to lay it had expired, and it was claimed that the city was not answerable for their acts because they were not authorized, the court said: "We recognize the doctrine to be that the unauthorized acts of municipal officers are regarded as acts of the municipal corporation, provided the acts are performed by that branch of the municipal government which is invested with jurisdiction to act for the corporation upon the subject to which the particular acts relate. In the present case, the mayor, the superintendent of police, and the superintendent of streets were engaged in doing the acts which prevented the railroad company from constructing its road. The mayor is the general executive officer of the city. He and others under his control are the executive department of the city, and we cannot doubt that the city was by law liable for those wrongful acts done by the officers of the executive department within the sphere of their authority, though not authorized by the common council to do them, as by its (the city's) own acts": *Chicago v. Chicago etc. R. R. Co.*, 105 Ill. 73. This language was probably a correct statement of the law applicable to the particular case to which the court applied it, but the inference which might be drawn from it—that the municipality is, as a general rule, liable for the wrongful acts or omissions of its officers—is not at all true. We have already called attention to the fact that a municipality is not answerable for the performance of duties confided to it or its officers of a governmental, discretionary character, for the performance of which neither the state nor its officers would have been answerable had the duty remained with them, and its performance not been delegated to the municipality or its officers. Besides these duties are many others devolved upon the officers of a municipality for the performance of which it is not answerable. Thus while the law may require a city treasurer to keep certain moneys, or a city clerk or auditor to keep certain accounts and records, or a city surveyor to make surveys, the city is not answerable for the default of either in performing his duties. The reason is, that he is not an agent of the city, nor carrying out its orders, nor doing anything which the law requires it to do. If a duty is one which the law requires the city to perform, and it is not a public

governmental duty, then the city is answerable for the manner of its performance, and for such injuries as result from its omission or its negligent performance. If, on the other hand, the law requires some officer to perform a duty, then its omission or negligent performance is a matter for which he alone is answerable: *Maximilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468. "The officers of a city are quasi civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or non-feasance in office, but for neither is the corporation responsible. Omissions of a duty imposed upon them by law, productive of prejudice to an individual, is not a corporate injury. The duty of the officers of the city is prescribed by the statute, from which, also, they derive their power. The corporation appoints them to office, but does not in that act sanction their official delinquencies nor render itself liable for their official misconduct": *Prather v. City of Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585. Even with respect to matters for which the corporation is liable for the negligence of its officers, such liability cannot be enhanced by showing that they were actuated by malice: *City Council v. Gilmer*, 33 Ala. 116; 70 Am. Dec. 562. Whenever the duty of keeping in repair the highways is not regarded as a municipal duty which the city or town must, at its peril, perform, it is not liable for the neglect of its highway surveyors or overseers of highways: *Pratt v. Weymouth*, 147 Mass. 245; 9 Am. St. Rep. 691; *Goddard v. Harpswell*, 84 Me. 499; *ante*, p. 373 (the principal case); *People v. Board etc. of Esopus*, 74 N. Y. 310.

Contractors, Liability for. — When a municipality contracts for the doing of a work, and injury results to private persons from the wrongful or negligent act or acts of the contractor or his employees, and the city is sought to be made liable for such injury, the inquiry should be, — 1. Was the work one which it was the duty of the city to do, and for negligent acts in the doing of which it must necessarily be answerable? and 2. If the work was not of this class, were the circumstances under which it was done and the control of the city over it by the terms of the contract or by law such that whatever was done must be regarded as its act accomplished by its contractor acting as its agent? As we have already shown, certain duties are by many of the courts regarded as private municipal duties, the negligent performance or omission of which is at the peril of the municipality. The principal of these is keeping in safe condition and repair the public streets. It seems obvious to us that a municipality cannot escape liability with respect to these duties by contracting for their performance by some one who is not an officer of the city. It cannot contract away its liability, and thus delegate its responsibility to another, so that a person injured by his putting or leaving a street in a dangerous condition must look to him alone for recompense. Thus where a city owing to the public the duty of keeping its streets in a safe condition for travel contracted for the construction of a sewer in one of such streets, and the contractor, in making an excavation for the sewer, permitted it to remain open and unguarded at night without any light or other signal of danger, and a person using due care fell into the excavation and was injured, and a city denies its liability on the ground that the work was executed under a contract which contained no stipulation that the contractor should take any precautions to prevent injury to travelers, but the court decided that "although the work may be let out by contract, the corporation still remains charged with the care and control of the streets in which the improvement is carried on," and therefore that the city was liable. Some stress was, however, in the opinion of the court, placed upon the fact that

the work was such that its performance necessarily left the street unsafe for travelers at night: *Storrs v. City of Utica*, 17 N. Y. 104; 72 Am. Dec. 437. See also *Water Company v. Ware*, 16 Wall. 566; *Robbins v. Chicago*, 4 Wall. 657. Nor is it material in such case that the municipality provided in its contract that the contractor should take such precautions as would have prevented injury to persons using the street had he complied with his agreement: *McAllister v. City of Albany*, 18 Or. 426. The decided weight of authority at the present time is to the effect that where it is the duty of the municipality to keep its streets in safe condition for travel, it must respond in damages to any person injured by the streets being left in an unsafe or dangerous condition, though they were so left through the act or neglect of an independent contractor, or of his servants or agents over whom it had no direct control: *Mayor etc. of Baltimore v. O'Donnell*, 53 Md. 110; 36 Am. Rep. 395; *Mayor of Birmingham v. McCary*, 84 Ala. 469; *Nashville v. Brown*, 9 Heisk, 1; 24 Am. Rep. 289; *Logansport v. Dick*, 70 Ind. 65; 36 Am. Rep. 166; *St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *Circleville v. Neuding*, 41 Ohio St. 465; *Wilson v. Wheeling*, 19 W. Va. 323; 42 Am. Rep. 780; Dillon on Municipal Corporations, 4th ed., sec. 1027. In a few of the states the rule as we have stated it is not recognized, and the contractor alone is answerable for his negligence in leaving the streets in a dangerous condition, where the city reserves no control over him and his work, other than the right to have done it according to the plans and specifications: *Barry v. St. Louis*, 17 Mo. 121; *Painter v. Pittsburgh*, 46 Pa. St. 213; *City of Erie v. Caulkins*, 85 Pa. St. 247; 27 Am. Rep. 642. If an injury occurred, not from the condition in which the street is left by the contractor, but by his doing, while engaged in the performance of his contract, some act in a negligent manner, then the authorities are more equally divided concerning the liability of the city. Thus if he blasts rocks without giving warning of danger, and a person using a street in the vicinity is struck by a fragment of such rock, some of the courts affirm (*Logansport v. Dick*, 70 Ind. 65; 36 Am. Rep. 166) and others deny (*Blumb v. Kansas*, 84 Mo. 112; 54 Am. Rep. 87; *Herrington v. Lansingburgh*, 110 N. Y. 145; 6 Am. St. Rep. 348) the liability of the city, while others make the liability depend on whether or not the work for which it contracted was such that in the doing of it blasting was necessary, holding that liability exists if the blasting was a necessary consequence of the doing of the work according to the contract: *Joliet v. Harwood*, 86 Ill. 110; 29 Am. Rep. 17. Where the injury for which recovery is sought resulted from the act or neglect of a contractor, and does not consist in the leaving of the street or other public place in an unsafe or dangerous condition, nor in the doing of work which, if done according to the contract, is necessarily and intrinsically dangerous, than the liability of the city exists only when it occupies with the contractor the relation of principal and agent. Thus if it retains full control over the mode and manner of performing the work, or if the wrong or injury was a necessary consequence of the work, or occurred in doing something which the contract gave the contractor a right to do, then the municipality must be regarded as itself guilty, and held answerable accordingly: *Harper v. City of Milwaukee*, 30 Wis. 375; *Cincinnati v. Stone*, 5 Ohio St. 38; *Nevins v. Peoria*, 41 Ill. 502; 89 Am. Dec. 392. Hence if a contract provides that as part of the consideration for doing the work, the contractor may receive and use all stone in a street, and he accordingly takes and uses such stone, when it belonged to the owner of the fee of the street, the latter may recover of the city therefor: *Rich v. Minneapolis*, 37 Minn. 423; 5 Am. St. Rep. 861. If the work which the municipality employs the

contractor to do is "intrinsically dangerous, however skillfully performed," then a municipality, like any other employer, is responsible for damages inflicted in the doing of the work: *Blake v. Ferris*, 5 N. Y. 48; 55 Am. Dec. 304; *Erie v. Calkins*, 85 Pa. St. 187; 27 Am. Rep. 642; Dillon on Municipal Corporations, secs. 1029, 1030. "But employers not personally giving directions respecting the manner of the work, but contracting with a third person to do it, are not liable for a wrongful or negligent act in the performance of the contract, if what was agreed to be done was lawful, and does not constitute a nuisance, or is not intrinsically dangerous": Dillon on Municipal Corporations, sec. 1029; *Herrington v. Village of Lansingburgh*, 110 N. Y. 145; 6 Am. St. Rep. 348.

GROTON v. GLIDDEN.

[84 MAINE, 562.]

FIGHTING, LIABILITY FOR INJURIES INFLICTED IN. — If two persons voluntarily engage in a fight, either may maintain an action against the other to recover damages for injuries received. The fact that the fight was voluntary is admissible only in mitigation of damages.

H. Bliss, Jr., and W. A. Fogler, for the plaintiff.

L. M. Staples, for the defendant.

WALTON, J. This is an action to recover damages for an assault and battery. The plaintiff has obtained a verdict for fifty dollars, and the case is before the law court on motion and exceptions by the defendant.

The evidence satisfies us that the plaintiff's injuries were received while he and the defendant were engaged in a voluntary fight. The defendant contends that he acted only in self-defense. But the evidence satisfies us that the fight was voluntary on the part of both parties. This brings us to the question whether, if two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive. We think he can. It seems to be settled law that each may maintain an action against the other. It is familiar law that each may be punished criminally. And it seems to be equally well settled that, by the rules of the common law, each may have an action against the other and recover full damages for all the injuries he received. The fact that the fight was voluntary is admissible in evidence, as are many other facts, to keep down the amount of the punitive damages, but not to reduce the actual damages.

In *Boulter v. Clark*, cited in Bull. N. P. 16, the court held

that, the fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action, and that he was entitled to a verdict for the injury done him.

In *Matthew v. Ollerton*, Comb. 218, the court held that "if a man license another to beat him, such license is void, because it is against the peace."

In *Stout v. Wren*, 1 Hawks, 420, 9 Am. Dec. 653, the court held that where two fight by consent, the one who is beaten may recover damages; for, fighting being an unlawful act, the consent is void. In that case the plaintiff and the defendant quarreled and agreed to fight, the defendant asking the plaintiff if he would clear him of the law, and the latter answering, Yes. Mr. Justice Hall thought that, upon principle, the maxim, *Volenti non fit injuria*, ought to apply; but conceded that the law seemed to be the other way, and acquiesced in the opinion of Chief Justice Taylor, that the action was maintainable.

In *Dole v. Erskine*, 35 N. H. 503, the court held that a recovery may be had in cross-actions for the same affray; by the party assailed for the assault first committed on him, and by the assailant for the excess of force beyond what was necessary for self-defense.

In *Adams v. Waggoner*, 83 Ind. 531, 5 Am. Rep. 230, the jury were instructed that if they should find from the evidence that the plaintiff and the defendant fought by agreement or by mutual consent, such agreement would be no bar to the plaintiff's recovery of damages, but might be considered in mitigation of damages, but not to the extent of preventing the plaintiff's recovery of such damages as he actually sustained by the acts of the defendant; and the law court sustained the instruction. The same doctrine is held in *Logan v. Austin*, 1 Stew. 476; *Bell v. Hansley*, 8 Jones, 131; and *Commonwealth v. Collberg*, 119 Mass. 350; 20 Am. Rep. 828.

In *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538, the plaintiff and defendant were neighbors, quarreled about their line fence, and had a fight. And it is stated in the opinion of the court that although they were both old men, it was but just to say that they fought with great spirit and brutality. Both of the plaintiff's eyes were gouged, and the sight of one of them permanently impaired. He recovered a verdict for five hundred dollars, which the court sustained, holding that where two fight in anger, by consent, each is liable to the other for actual damages.

In the present case, the evidence shows that the plaintiff and the defendant had been on unfriendly terms for many years. The defendant had fastened upon the plaintiff the name of "Hog Back," and had expressed great satisfaction on learning that the latter was about to move out of the neighborhood. The plaintiff had called the defendant a hypocrite in religion, and expressed a long-felt desire to punch his head. They met in the highway, and the result was, first an altercation, and then a fight, each one being as ready and as willing to enter into the fight as the other. The plaintiff got the worst of it. The defendant testified that he escaped with no other damage than a torn shirt-collar. The plaintiff went home with two black eyes, a scratched face, a bruised head, a lame back, and a kick on the lower part of his abdomen, which caused him to pass bloody urine. Surely, if the defendant escapes with a verdict against him of only fifty dollars, he may think himself lucky. His plea of "self-defense" makes quite as feeble an impression on the court as it seems to have made on the jury.

It appears from the bill of exceptions that the presiding justice had considerable difficulty in making the jury understand that they could not give the plaintiff damages, and by the same verdict find the defendant not guilty. But he finally succeeded, and obtained a verdict in proper form. The course pursued by the presiding justice was entirely proper.

Motion and exceptions overruled. Judgment on the verdict.

ASSAULT — MUTUAL COMBAT — CIVIL ACTION FOR DAMAGES. — In an action for damages for assault and battery, it is permissible for the defendant to show, in mitigation of damages, that the parties fought by mutual consent, but such consent cannot be shown as a bar to the action: *Barbott v. Wright*, 45 Ohio St. 177; 4 Am. St. Rep. 535, and note, in which the cases are collected; note to *Skay v. Thompson*, 48 Am. Rep. 540; note to *Commonwealth v. Collberg*, 20 Am. Rep. 320. Where two fight by consent, the one who is beaten may recover damages; for, fighting being an unlawful act, the consent is void: *Stout v. Wren*, 1 Hawks, 420; 9 Am. Dec. 653, and note.

WILLIS v. FRENCH.

[84 MAINE, 593.]

INDORSER OF TOWN ORDERS, LIABILITY OF. — A payee of a negotiable instrument transferring it by indorsement either before or after maturity, whether it be strictly commercial paper or not, as town orders, thereby guarantees the genuineness of the writing and the validity of the promise. If the writing is forged, or void, or *ultra vires*, the indorsee has the right to elect either to rely upon the contract of indorsement or to sue for the consideration paid. In the latter event, the statute of limitations runs from the date of the payment of the money, and in the former, from the time when the indorsed promise becomes due.

TOWN ORDERS ARE NOT STRICTLY COMMERCIAL PAPER, but, when negotiable, may be transferred as if they were.

H. M. Heath and J. C. Holman, for the plaintiff.

J. H. Thompson, for the defendants.

HASKELL, J. The payee of a negotiable promise in writing, who transfers the same by indorsement, either before or after maturity, whether it be strictly commercial paper or *quasi* such, — that is, negotiable in form, but lacking some elements of such paper, as town orders, always subject to equitable defenses whosoever the holder may be, — thereby guarantees both the genuineness of the writing and the validity of the promise. If the writing be forged, or the promise be void, as *ultra vires*, the indorsee may elect to repudiate the contract of indorsement and sue for the consideration paid, or treat it as valid so far as the indorser is concerned, for he is estopped from denying its validity, and hold him according to its tenor: *Ferguson v. Staples*, 82 Me. 159; 17 Am. St. Rep. 470.

If the indorsee repudiates the contract and sues to recover the money that he paid for it, his cause of action ordinarily accrues at the time he paid his money, and becomes barred after the lapse of six years: *Blethen v. Lovering*, 58 Me. 437; but if he stands by his contract and elects to hold his indorser to his warranty, to payment according to the terms of the indorsement, then, of course, his cause of action accrues when the indorsed promise falls due.

In this case, the defendants, as payees, transferred by indorsement to the plaintiff, for value, two town orders, more than six years prior to the date of his writ, so that his action is barred, unless the orders are held to have been given on ten years' time.

The orders bear date June 1, 1870, and were directed to the

town treasurer, requesting him: "Pay to S. and C. W. French or order five hundred dollars, it being for money loaned, agreeable to a vote of the town passed April 25, 1870, and interest annually." They were signed by the selectmen and accepted by the treasurer of the town on the day of their date. A plain construction of these orders is a request to the town treasurer to pay agreeable to a vote of the town, they having been given for money loaned. The vote became a part of these orders, and if they were given according to its provisions, its terms as to payment fixed the time when the orders should fall due. The vote authorized a loan of two thousand dollars to the defendants for ten years, without interest, in town orders payable to their order, at the expiration of that time, with interest annually, upon condition that they should rebuild their mill, etc., and mortgage it to the town to secure their notes to the town for two thousand dollars, payable in ten years, without interest. The defendant complied with all the conditions to entitle them to the orders in suit.

In short, the town gave its notes to the defendants on ten years with interest annually, in exchange for their notes of the same amount, on the same time, without interest; or in other words, promised to give them interest upon two thousand dollars for ten years, as an inducement to continue their manufacturing business in the town.

The plaintiff bought these orders from the defendants in good faith, for valuable consideration. They have had the plaintiff's money, and the use of it for ten years, until the orders were supposed to fall due; and why should they not be held to repay the same? Certainly, as between the plaintiff and the defendants, there are no equities to shield the latter from payment. They had the money, and should account for it to some one; and if they pay it to the plaintiff, they cannot be held to pay it again upon their notes to the town. Because the town may not be held by law to give the defendants interest upon two thousand dollars for ten years, it is hard to require the plaintiff to give them both principal and interest.

Suppose the vote of the town had been printed upon the backs of these orders, as customary in many cases, would it be contended that the terms of the votes did not fix the time when the orders should become payable? The liability of these defendants is the same as though the orders were valid obligations of the town. Their indorsement of them guaran-

tees their validity. The orders refer to the vote in specific terms as controlling the transaction. They recite the date of its passage, making its identity certain.

The court considers that a fair construction of the orders, controlled by the terms of the vote of the town, makes them payable at the expiration of ten years, and not before. That all parties so considered the contract, is clearly shown by their acts. Town orders are not strictly commercial paper, but, when negotiable, may be transferred as if they were. They are ordinarily drawn and negotiated by plain men, and should be given a sensible construction. By apt punctuation these orders read: Pay five hundred dollars, it being for money loaned, agreeable to a vote of the town passed April 25, 1870; or to put it more plainly: Pay five hundred dollars, agreeable to a vote of the town, it being for money loaned.

The action is not barred by the statute of limitations.

Exceptions sustained.

NEGOTIABLE INSTRUMENTS — LIABILITY OF INDORSERS.— Where a payee indorses a note before it is signed, and delivers it to the maker to sign, so as to enable him to obtain money for their joint benefit, he will not be allowed to deny the authority of the maker to sign it in the name of the partnership of which he is a member: *Montgomery v. Crosthwait*, 90 Ala. 553; 24 Am. St. Rep. 832; note to *Holmes v. Briggs*, 17 Am. St. Rep. 810. Under the law merchant, the indorsement of a note amounts to a contract on the part of the indorser that, if when duly presented, it is not paid by the maker, the indorser will, upon notice given him of its dishonor, pay it to the indorsee or other holder: *Dunigan v. Stevens*, 122 Ill. 398; 3 Am. St. Rep. 496, and note; see extended note to *Burton v. Hanford*, 27 Am. Rep. 590.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

**GRAND LODGE ANCIENT ORDER OF UNITED WORK-
MEN v. NOLL.**

[99 MICHIGAN, 37.]

BENEFIT SOCIETIES — LOSS OF CERTIFICATE — CHANGE OF BENEFICIARY BY WILL. — When a certificate of membership and insurance in a benefit society is lost or mislaid by the assured, without fault on his part, so that it is impossible for him to name a new beneficiary in the manner prescribed by the by-laws of the society, a court of equity will enforce his disposition of the insurance by a will, in which he names a new beneficiary.

Blair, Wilson, and Blair, for the appellant.

Albert P. Jacobs, for the appellee.

Loud and Price, for Christine Noll.

MONTGOMERY, J. This is a bill of interpleader, the contest being between the two defendants, Christine Noll and Michael Noll.

It appears that one Jacob Noll, the son of Michael Noll, and husband of the defendant Christine Noll, became a member of the Order of United Workmen, and received a certificate, dated July 3, 1879, stating that he was entitled to all the rights and privileges of membership in the order, and to participate in the beneficiary fund of the order to the amount of two thousand dollars, which sum should, at his death, be paid to his wife, Christine Noll, and also containing a provision as follows: "This certificate is issued upon the express condition that said Jacob Noll shall in every particular, while a member of said order, comply with all the laws, rules, and requirements thereof."

The only provision of the by-laws relating to a change of beneficiary is section 18 of article 7, which provides that "any member holding a beneficiary certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change in writing on the back of his certificate in the form prescribed, attested by the recorder, with the seal of his subordinate lodge attached, and by the payment to the grand lodge of the sum of fifty cents."

No authorization of a change of beneficiary was ever indorsed upon the certificate in the form prescribed; but shortly before his decease, Jacob Noll executed a last will and testament, in which he bequeathed the insurance money to the defendant Michael Noll. This will has been duly probated, after a contest made by defendant Christine Noll on the ground of mental incapacity of Jacob Noll, and alleged undue influence exerted by Michael Noll and others.

The testimony is very conflicting as to the mental condition of Jacob Noll at and about the time of making this will. We are satisfied, however, from a careful examination of the record, that Jacob Noll desired to make a change in the beneficiary named in the certificate, and caused a search to be made for the same, which was unavailing, and that thereupon he executed the will in question. The validity of this will is not now open to question; but it is still contended that, although probated and found to have been the last will and testament of Jacob Noll, a change in the beneficiary cannot be effected except by such an indorsement as section 18 of the by-laws of the order requires.

It was held in the case of *Supreme Lodge v. Nairn*, 60 Mich. 54, that such an agreement between the company and the assured is to be observed by the courts, and that it evidences a purpose that the corporation shall always be in written contract relations with a member who is alive and is in good standing, which will show them the identity of the beneficiary to whom they are liable. But in the case of *Grand Lodge v. Child*, 70 Mich. 163, this court held that in case a certificate is destroyed, without fault of the assured, so that it is impossible to exercise the right of naming a new beneficiary in accordance with the method prescribed by the by-laws of the corporation, a court of equity would recognize a designation of a beneficiary by any other method which may manifest his intention to exercise the right, which he unquestionably possessed, of changing the beneficiary. We think that that case

is decisive of the case under consideration. The certificate having been lost or mislaid without fault of the assured, it was likewise impossible for him to name a new beneficiary in the manner prescribed by the by-laws, but a court of equity can and should recognize the disposition by will.

The decree below will be reversed, and one entered in this court declaring the defendant Michael Noll entitled to the fund. No costs will be awarded in this court.

MUTUAL BENEFIT SOCIETIES. — CHANGE OF BENEFICIARIES: See, generally, note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 786-791. The general rule is, that where a certificate of membership and insurance issued by a benefit society specifies the mode in which a change of beneficiary may be made, such mode must be strictly followed, or the change will not be valid: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260, and note. Therefore, a change of beneficiary cannot be made by the will of a member when the by-laws of the association point out a mode in which such changes can be made, and that mode was not adopted: *McCarthy v. Supreme Lodge*, 153 Mass. 314; 25 Am. St. Rep. 637. Where, however, the insured member has in good faith attempted to comply with the mode prescribed for changing his beneficiary, but, owing to circumstances beyond his control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260.

HARROW SPRING CO. v. WHIPPLE HARROW CO.

[90 MICHIGAN, 147.]

CONTRACT OF SALE — CONSTRUCTION. — When, at the time an agreement is entered into to furnish a quantity of harrow teeth of "regular patterns, such as heretofore furnished," the parties test the quality of the teeth which have been furnished, the agreement must be construed to mean that the teeth to be furnished are to correspond in quality with the teeth theretofore furnished.

CONTRACT OF SALE — CONSTRUCTION — EVIDENCE. — Under a contract by which the seller agrees that shipments of the goods will be made as specified, and that "we will also agree to furnish what additional amounts of the above goods you may require for your season's trade upon the same terms and conditions, but are to have reasonable time and notice in which to fill any additional amount, say about thirty days," the seller must have a reasonable time after the goods are specified or named within which to make the shipment; and although the buyer may show by parol that he gave an order for goods on the day that the contract was made, he cannot vary the terms of the agreement by parol proof that the seller agreed to keep the goods on hand ready for immediate shipment.

DAMAGES — RECOUPMENT. — In an action by a seller to recover for goods furnished under a written contract, the buyer may recoup his expenses

incurred in making sales in expectation of the delivery of the goods within the time specified in the contract, and which he failed to complete because of the failure of the seller to so deliver.

Boudeman and Adams, and H. E. Walbridge, for the appellant.

Osborn and Mills, and Howard and Ross, for the appellee.

MONTGOMERY, J. This action was brought to recover for harrow teeth furnished by the plaintiff to the defendant during the year 1889. The defendant sought to recoup damages, on the ground that the teeth furnished were not properly tempered, and particularly for the reason that they were not of as good quality as certain teeth which had been furnished to defendant, and with which tests had been made prior to the making of the contract referred to below, and also sought to recoup damages for the failure of the plaintiff to furnish the teeth within the time contemplated.

The contract was made November 21, 1888. The plaintiff had previously furnished the defendant a quantity of harrow teeth. The plaintiff's agent, Mr. Burdick, visited Eaton Rapids, then the home office of defendant, and a test of the teeth was made in his presence, which proving satisfactory, the plaintiff made to the defendant this proposition: "We will agree to furnish you with twenty-eight thousand harrow teeth, of your regular patterns, such as heretofore furnished, and twelve thousand special double-edge teeth as per pattern, at four and one half cents per pound."

The defendant accepted the proposition in writing.

1. The trial judge appears to have interpreted the words "such as heretofore furnished" as referring to the patterns spoken of, and to have construed the contract as though it had read: "We will furnish you twenty-eight thousand teeth of the same patterns heretofore used." The defendant contends that the language imports that the teeth to be furnished are to correspond to those theretofore furnished. We agree with this view maintained by the defendant. The parties had, on the very day of making the contract, tested the quality of the teeth which had been furnished, and it was evidently a matter which they had under consideration; and we think the language, fairly construed, refers to the quality of teeth to be furnished. This view is strengthened by the fact that the term "regular patterns" sufficiently fixed the style, size, and shape of the teeth, and the words "such as hereto-

fore furnished" were wholly unnecessary to complete the description. The rulings relating to this subject are erroneous.

2. Defendant alleges as error that the court refused to permit its witnesses to testify that it was agreed that the plaintiff should have the goods on hand when ordered. The provision of the contract relating to shipments is as follows: "Shipments of these goods to be made as specified, but not later than July 1, 1889. We will also agree to furnish what additional amounts of the above goods you may require for your season's trade upon the same terms and conditions, but are to have reasonable time and notice in which to fill any additional amount, say about thirty days."

The circuit judge permitted the defendant to show what orders were given at the time the contract was made, but construed the contract to mean that the plaintiff was to have a reasonable time after the goods were specified or named within which to make the shipment, and ruled that it could not be shown by parol that plaintiff agreed to keep the teeth on hand ready for immediate shipment. In view of the fact that the teeth were to be manufactured from different patterns, which were the patterns of the defendant company, we think the trial judge correctly construed the contract to be one requiring manufacture and shipment within a reasonable time after being informed as to the goods required. Such being the construction of the contract, while it was competent for the defendant to show that it gave an order on the same day the contract was made, or designated the kind of goods required, and quantity, it was not competent to show by parol any other or different agreement relating to the time when the shipments were to be made: *Toledo etc. R. R. Co. v. Johnson*, 55 Mich. 461; *Coon v. Spaulding*, 47 Mich. 162; *Stange v. Wilson*, 17 Mich. 342. In the latter case, Campbell, J., after referring to various cases cited which were claimed to establish a contrary rule, said: "There is in none of these cases, nor in any others that I have found (except the case in 3 Sumner), any intimation that the proof, which was not valid to prove new terms of an agreement, was valid to affect it indirectly, by raising presumptions concerning the belief or expectation of the parties. It is hardly possible that such a use of testimony would have eluded the ingenuity of so many learned courts and counsel, if it is really admissible. And if such proof is to be received, it is manifest that the rule excluding parol evidence

will become very difficult and uncertain in its application, if not entirely useless."

3. Complaint is made of the charge on the subject of damages. It will be seen that the contract was made with reference to the defendant's "season's trade," and it is clear that the profits to be derived by the defendant from a resale of the harrows were within the contemplation of both parties when they assumed contract relations. The defendant at the trial offered testimony tending to show, — 1. That it sold harrows which were thrown back on its hands because of defective teeth; 2. That it incurred large expense in taking orders which it was unable to fill because of the default of plaintiff in delivering the harrow teeth as required by the terms of the contract.

In treating of the defendant's right to recover damages under this evidence, the trial judge instructed the jury as follows: "Now, I have said to you that you are not to take into account all the elements that enter into the question of these profits. What the harrows cost in the shop, the material and cost of setting up, and what they sold for, — the difference between the two would not furnish the proper criterion. You would have to consider these other elements that I have called your attention to, and then you would have to deduct from these the freight that the defendant had to pay in shipping the harrows to its customers, the expense of its sales, its office expenses, — all those various things that enter into the account, and you should take into the account, — because any other rule would compel plaintiff to pay the expenses of carrying on the defendant's business, which never is contemplated by this or any other contract. Then after you have taken all those elements into account, and found what were the net profits on each harrow that the defendant lost the sale of, then for that number of harrows you should find how much should be recouped on that account."

These instructions preclude the defendant from recovering for expense incurred in making sales, and limit the recovery to the profits which it would have made, after deducting such expense, in case it had been able to complete the sales and furnish the goods. This is clear error. Under such a rule, if the defendant had undertaken to furnish its customers with goods at actual cost, including cost of making sale and delivery, and had been prevented from doing so by the plaintiff's breach of contract, it could not have recovered for expenses

incurred in making the sale. In a case like the present, the injured party is clearly entitled to recover his damages for expenses incurred, in good faith, in anticipation of performance by the other party: 1 Sutherland on Damages, 110; *Mann v. Taylor*, 78 Iowa, 355; *United States v. Behan*, 110 U. S. 338.

There are sixty-two assignments of error in the record. In view of the foregoing rulings, the other questions are not likely to arise on a new trial.

The judgment will be reversed, with costs, and a new trial ordered.

CONTRACTS OF SALE — CONSTRUCTION. — PAROL EVIDENCE to show antecedent or contemporaneous agreement: See note to *Sullivan v. Lear*, 11 Am. St. Rep. 394. Written agreement may be added to, modified, explained, reformed, or set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name thereto: *Ferguson v. Rafferty*, 128 Pa. St. 337; *Cake v. Pottsville Bank*, 116 Pa. St. 264; 2 Am. St. Rep. 600. In the note to the latter case are collected a large number of cases in the series, which relate to this subject. Parol evidence is admissible to show that at the time of the execution of a written contract a parol agreement was entered into by the parties and made a part of it: *Redfield v. Gleason*, 61 Vt. 220; 15 Am. St. Rep. 889; as, for example, a contemporaneous parol agreement concerning the time during which the written agreement was intended by the parties to remain in force: *Real Estate etc. Co.'s Appeal*, 125 Pa. St. 549; 11 Am. St. Rep. 920; or to show the character of the liability of one who accepts a draft, and adds "executor" to his name: *Schmittler v. Simon*, 114 N. Y. 176; 11 Am. St. Rep. 621.

RECOUPMENT. — Damages arising from breach of contract, contemplated by the parties at the time the contract was made, may be the subject of recoupment: *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299. Thus in an action on a promissory note, the defendant may plead, by way of recoupment, that the note was given under a contract, by the terms of which the payee was to furnish wagons to be sold by the maker on commission, and was not to sell, nor to furnish to be sold, any other wagons to any other dealer in the same town, and that the plaintiff, after furnishing wagons to the defendant, and receiving therefor the note in suit, violated his agreement by furnishing wagons to other dealers, whereby defendant was prevented from selling the wagons furnished him at a profit: *Andre v. Morrow*, 65 Miss. 315; 7 Am. St. Rep. 658. As to recoupment generally, see note to *Van Epps v. Harrison*, 40 Am. Dec. 320-337.

HUBBARD v. PRESTON.

[90 MICHIGAN, 221.]

Does — RIGHT TO KILL, AS NUISANCES. — A property owner who keeps no dog, and who, together with his family, has been seriously and nightly annoyed for some time by a congregation of barking, quarreling, and fighting dogs upon his premises, has a right to use all reasonable and necessary means to protect his family from such a nuisance, and he cannot be held liable for the value of a dog killed by him in an attempt to drive them away, if he did not know who owned any of them, and did not shoot at any particular dog.

Julian G. Dickinson, for the appellant.

Corliss, Andrus, and Leste, for the appellee.

LONG, J. On November 9, 1890, defendant shot and killed plaintiff's dog. An action was commenced in justice's court, where defendant had judgment. On appeal to the circuit court for Wayne County, the cause was tried before a jury. The only question submitted to the jury on the trial in the circuit court was the value of the dog, which the jury found to be twenty-five dollars, and verdict and judgment were entered for that amount. Defendant brings error.

On the trial the defendant introduced testimony tending to show justification for the killing. The court permitted the testimony to be introduced, but held that it did not amount to a justification. The only question raised in this court is, whether the court should have submitted that branch of the case for the determination of the jury.

We think the court was in error in not so doing. It appeared that the defendant did not keep a dog; that he lived on Bagg Street, city of Detroit, and for eight days prior to the shooting he and his family had been greatly annoyed by the congregation of a large number of dogs about his premises, barking, quarreling, and fighting there; that they came every night upon his lawn, about his house, when it became dark (on two occasions he counted twelve dogs), and that they kept up their cries all night, at intervals; that he complained to the police on three different days prior to the killing, but without any relief, and he had driven them away on several nights; that the noise made by them kept the members of his family awake, and seriously annoyed them; that he did not know the owners; that on the night he killed plaintiff's dog he drove them away twice, but they returned; that he could not get near them, but they would return; that they became an intoler-

erable nuisance, and finally, about eight o'clock in the evening, he went out with his revolver, and shot among them, while on his lawn. He did not know who owned any of them, and did not shoot at any particular dog.

The defendant had a right to protect his family from such nuisance; and it was a question for the jury whether he used such means as were reasonable and necessary, under the circumstances, to rid himself of it.

The judgment must be reversed, with costs, and a new trial ordered.

ANIMALS, RIGHTS AND LIABILITIES OF LAND-OWNER AS REGARDS TRESPASSING. — Horse found trespassing in another's close may be turned into highway without any liability arising from its straying away: *Cory v. Little*, 6 N. H. 213; 25 Am. Dec. 458; *Humphrey v. Douglass*, 11 Vt. 22; 34 Am. Dec. 668; but he who turns it into the highway is liable to owner of animal for any injury which results to it from a failure to exercise ordinary caution in so doing: *Totten v. Cole*, 33 Mo. 138; 82 Am. Dec. 157. For unnecessary violence to trespassing cattle a person is liable: *Richardson v. Carr*, 1 Harr. (Del.) 142; 25 Am. Dec. 65; but he will not be liable for driving them away with a dog, if he exercises ordinary care and prudence as to size and character of the dog, and the manner of setting him upon the cattle and afterwards pursuing them: *Clark v. Adams*, 18 Vt. 425; 46 Am. Dec. 161.

CROW v. CONANT.

[90 MICHIGAN, 247.]

EXECUTORS AND ADMINISTRATORS — APPOINTMENT OF DEBTOR AS PAYMENT. — The equitable rule that if a debtor is appointed executor of the will of his creditor, and accepts the trust, the debt is presumed to have been paid, and is treated as assets in the hands of the executor for the payment of debts and legacies, does not operate to discharge a lien by which such debt is secured.

EXECUTORS AND ADMINISTRATORS — APPOINTMENT OF MORTGAGOR AS EXECUTOR IS NOT PAYMENT OF MORTGAGE. — When a mortgagor is appointed executor of the will of his mortgagee, and inventories the recorded mortgage as part of the assets of the estate, without mentioning the mortgage note, which is produced in court and treated as assets during the administration, his appointment as executor will not operate to discharge the mortgage and note, but they become assets of the estate, and may be legally assigned to a legatee under an order of final distribution. Such legatee may then maintain a bill to foreclose the mortgage, although, prior to its assignment or distribution, and to the final discharge of the executor, he had represented the mortgaged land to be unencumbered, and had sold it to a third person, received the purchase-money, and executed a warranty deed. In such case the purchase-money received by the executor will be applied to the payment of the mortgage

debt, and the balance due on such debt will be declared a lien on the land in favor of such legatee; and as the purchaser from the executor has a complete remedy at law upon his warranty of title, the fact that he has absconded, leaving no property, affords no ground for equitable relief against such legatee.

EXECUTORS AND ADMINISTRATORS — APPOINTMENT OF MORTGAGOR AS EXECUTOR DOES NOT AFFECT EQUITY OF REDEMPTION. — When a mortgagor is appointed executor of the will of his mortgagee, and accepts the trust, the mortgage debt is not thereby discharged as a lien against the land, and it thereby becomes an asset of the estate, but the equity of redemption does not thereby become such an asset, and if the mortgage debt is assigned to a legatee on final distribution, the latter does not acquire any interest in money thereafter received by the executor upon his sale of such equity of redemption.

Charles N. Legg, for the appellants.

John D. Shipman, for the appellee.

GRANT, J. The material facts in this case are these:—

October 25, 1875, one William Little, being the owner of the land involved in this controversy, deeded it to one Phineas P. Nichols, and Nichols at the same time gave to Little a purchase-money mortgage on the same land for two thousand five hundred dollars. The mortgage was recorded October 28th of the same year, and on the same date was assigned by Little to Henry C. Lewis. This mortgage was held by Lewis until his death in 1884. Mr. Lewis died testate, naming Mr. Nichols and two others as the executors of his last will and testament. They accepted the trust, and duly qualified, September 29, 1884. This mortgage was inventoried among the assets of the estate, but the note was not mentioned, although it appears to have been produced by the defendant upon the hearing of this cause in the court below. June 8, 1885, the probate court made an order of distribution of the estate under the will of Mr. Lewis. By this order the mortgage in question was assigned to the defendant, who, in 1890, instituted foreclosure proceedings by advertisement. This mortgage was a part of the full amount due her as legatee. She gave her receipt therefor to the executors, who filed the same in the probate court. The executors have not been absolutely discharged.

March 19, 1885, Nichols contracted to sell this land to Nathan Crow, the father of the complainants. Mr. Crow paid Nichols seven hundred dollars at the execution of the contract. He subsequently paid the attorney for the defendant seven hundred dollars, and the balance was paid to Nichols

on or before October 1, 1886, at which date Nichols executed to him a warranty deed. Complainants obtained their interest in the land by purchase from their father. Nichols represented to Nathan Crow that the land was unencumbered. Nichols up to that time had borne a good reputation, and Crow placed implicit confidence in his representations. A gross fraud was perpetrated upon him by Nichols, but of this neither Mr. Lewis nor the defendant, nor the co-executors of Nichols, had any knowledge.

The points urged by complainants are these: 1. That the debt of the executor Nichols must be treated as cash in his hands, and as such accounted for by him; 2. That the land contract became in Nichols's hands a security, one of the assets of the estate, and belonged with the mortgage; 3. That payments made to Nichols both before and after the transfer of the mortgage to the defendant should be applied upon the mortgage.

This bill was filed to enjoin the foreclosure proceedings. The decree directed the two payments of seven hundred dollars each to be applied upon the mortgage; that the remainder of said mortgage debt was a lien upon the land; and further held, "that the nomination by said Henry C. Lewis, in his will, of Phineas P. Nichols, one of his executors, did not operate to discharge said mortgage nor the lien on the land, but that said mortgage became and was assets of the estate in the hands of said executors, to be inventoried and treated as other like assets of said estate; that the distribution and assignment of said mortgage to defendant was valid, and vested the ownership thereof in said defendant."

Complainants alone appeal.

In England it is the general rule that if a debtor is appointed executor of the will of his creditor, and accepts the trust, the debt is thereby released. But equity presumes the debt to have been paid, and treats it as an asset in the hands of the executor for the payment of debts and legacies. In America this equitable rule prevails at law also, in the absence of statutory provisions: Woerner on Administration, sec. 311, and the authorities there cited. In many of the states the liability of executors and administrators, under such circumstances, is fixed by statute. The application of this equitable doctrine does not operate to discharge a lien by which the debt is secured: Woerner on Administration, sec. 512; *Kinney v. Ensign*, 18 Pick. 232; *Soverhill v. Suydam*, 59 N. Y. 140.

In *Kinney v. Ensign*, 18 Pick. 232, the land had been twice mortgaged. The mortgagor was appointed administrator of the second mortgagee, and included in the inventory the debt due from himself. It was held that he had the right to redeem as against the assignee of the prior mortgage. Shaw, C. J., who delivered the opinion, said: "The true and substantial ground is, that the taking of administration by the debtor is not in fact or in law, to all purposes, payment of the debt. As between the administrator himself and those beneficially interested in the estate, he is held to account for it as a debt paid, from convenience and necessity, because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself."

In the present case it is immaterial that the note which the mortgage was given to secure, and which was referred to in the mortgage, is not mentioned in the inventory. Its production by the defendant upon the hearing leads to the presumption that the note was delivered to Lewis by Little, was among the assets of the estate, and was, with the mortgage, transferred to the defendant. The mortgage and note were treated as assets belonging to the estate by the executors, by the probate court, and by the legatees. Under these circumstances, the legal title to both, by the assignment of the executors, passed to the defendant.

At the time of the assignment to defendant there was nothing upon record to indicate that complainants' father had any legal or equitable defense to the mortgage, nor to cause any suspicion that Nichols intended to defraud him. If he had examined the record in the office of the registrar of deeds before paying Mr. Nichols, he would have found a record of this mortgage, and could easily have protected himself from the fraud which Nichols was practicing upon him. It would certainly be most inequitable to visit the consequences of his implicit confidence in Nichols upon the defendant, whose legal right it was to rely upon this record. Granting that both parties are innocent, the complainants' grantor put it in the power of Nichols to commit the fraud, and, according to all the authorities, they must bear the consequences.

Nichols owned the equity of redemption. This interest was entirely distinct from that of the mortgage. A mortgagee

acquires no interest in it except by foreclosure. It did not become an asset of the estate by the appointment of Nichols as executor, and his acceptance. Whatever good morals may have required on the part of Nichols upon receipt of the money for the sale of this interest, neither the estate nor the defendant acquired any interest in the money received after the estate was closed as to the defendant.

Complainants have a complete remedy at law upon Mr. Nichols's warranty of title. It affords no ground of equitable relief against the defendant that Nichols has absconded, and left no property which can be seized to satisfy complainants' damages.

Decree affirmed, with costs.

EXECUTORS AND ADMINISTRATORS — EFFECT OF APPOINTING DEBTOR AS EXECUTOR. — At common law, a debt due from an executor to his testator was considered paid, and was assets in his hands. In equity, he is accountable for the amount of his debt as assets, not only for the payment of debts, but also for the benefit of residuary legatees: *Beall v. Hilliard*, 1 Md. 186; 54 Am. Dec. 649; *Kaster v. Pierson*, 27 Iowa, 90; 1 Am. Rep. 254. The bond of an obligor who becomes administrator of the obliged is thereby suspended, and the debt becomes assets in his hands as administrator: *Bislow v. Bislow*, 4 Ohio, 134; 19 Am. Dec. 591.

REDEMPTION, RIGHT OF: See note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 243-249.

HUTCHINSON v. WHITMORE.

[90 MICHIGAN, 255.]

TROVER FOR EXEMPT PROPERTY — SUFFICIENCY OF DECLARATION. — In an action of trover against a sheriff for the conversion of exempt property seized under execution, an allegation in the declaration that such sheriff, by his deputy or agent, naming him, did convert and dispose of the property, is sufficient to charge the sheriff; and in such case the usual declaration in trover is sufficient to enable the plaintiff to show such facts as are necessary for the recovery of such exempt property.

EXEMPTIONS. — DUTY OF OFFICER LEVYING UPON GOODS, any portion of which is exempt by law, is to have an inventory and appraisal made, and to permit the debtor to select, or, upon his neglect, to select for him, property to the amount allowed by law. Failing in this duty, the officer is liable to an action.

EXEMPTIONS — FARMERS. — Under a statute exempting from sale on execution the "tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value \$250," a yearling steer, a heifer,

two spring calves, and a quantity of hay, oats, corn, clover-seed, and cornstalks belonging to a farmer, are exempt to the statutory amount from levy on execution against him.

S. P. Hutchinson, for the appellant.

Salsbury and O'Mealey, for the appellee.

LONG, J. The court directed verdict and judgment in favor of the defendant. Plaintiff brings error.

The objections upon the trial relate to the form and substance of the declaration. The first count of the declaration is as follows: "Silas P. Hutchinson, plaintiff in this suit, complains of Ancil K. Whitmore [sheriff of said county for the year 1887], defendant in this suit, who has been duly summoned to answer the plaintiff in a plea of trespass on the case, for that, whereas, to wit, on or about the 2d day of November, 1887, in the township of Woodstock, in said county, said plaintiff was lawfully possessed as of his own property of the following goods and chattels, viz., 18 tons of tame hay, about 200 bushels of oats, about 400 bushels of corn in the crib, on the farm of said S. P. Hutchinson, the undivided $\frac{1}{4}$ of 300 bushels of corn in the crib on said farm, 6 tons of marsh hay in shed and stack on said farm, 1 red yearling steer, one black and white heifer, two spring calves, about 75 bushels of oats in the mill of Sanders & Son, in said Woodstock, the undivided $\frac{1}{4}$ of all the clover-seed on the premises of George Bowen in said Woodstock, about 1,500 bundles of cornstalks, all of great value, — of the value of \$300 (three hundred dollars). And, being so possessed thereof, the said plaintiff afterwards, to wit, on or about the day and year above named, and at the place last aforesaid, casually lost the said described goods and chattels and other property out of his possession, and the same afterwards, to wit, on the same year and day last aforesaid, and at the place aforesaid; came into the possession of the defendant, or his deputy or his agent, one James C. Morley, by finding; yet said defendant, well knowing the said above-described property to be the property of the said plaintiff, and of right to appertain to and belong to him, the said defendant has not as yet delivered the said above-described property, or any part thereof, to the said plaintiff, although often requested so to do, and hath hitherto wholly refused so to do; and on or about the same year and day last aforesaid, and at the place aforesaid, the said defendant did by his deputy or agent, the said James C. Morley, convert and dispose of the said above-de-

scribed goods and chattels and other property to his own use, to the damage of the plaintiff of \$300 (three hundred dollars). [Which said goods and chattels said plaintiff then and there owned, needed, and used in his business, which was that of farming, which said farming business was his principal business during the year 1887, and for several years previous thereto.] And the said conversion and sale of said goods and chattels was contrary to the provisions of sections 25, 27, 28, 29, 30, and 31, chapter 266, of Howell's Annotated Statutes of the state of Michigan [relative to judgment and the levy of executions], whereby the said goods and chattels were eventually lost to the said plaintiff, and by means thereof, of the loss of the use of the same in his business thereof, he was greatly and further injured and damnified to his damage \$300 (three hundred dollars)."

The second count of the declaration refers to the first count for a description of the property, and alleges the plaintiff's possession of it, and that it was seized and taken out of his possession by the deputy or agent of the defendant, who pretended to seize and take it by virtue of an execution issued out of the circuit court for the county of Lenawee, covering the goods and chattels of the plaintiff and Charles E. Gunn and Oliver P. B. Gunn, October 8, 1887, said execution being in favor of Frank Boss. This count further charges that it was the duty of the defendant or his deputy to make an inventory of the property seized, and to have the same appraised, and to permit or allow the plaintiff to select for himself such of the property as was exempt by law from sale on execution; that the defendant wholly failed and refused to allow such selection to be made, though the goods and chattels seized were of the nature which by the law were exempt from sale on execution.

Upon filing this declaration, the defendant pleaded the general issue, and gave notice, among other things, that the defendant, during the year 1887, was sheriff of Lenawee County. The notice then recites the judgment in favor of Frank Boss, and against the plaintiff and Charles E. Gunn and Oliver P. B. Gunn, and the issuing of the execution thereon, and the placing of such execution in the hands of his deputy, James C. Morley, for service, and that if any of the acts complained of in the declaration were done, it was by virtue of said execution, in seizing and levying upon the goods described in plaintiff's declaration.

The cause came on for trial in the Lenawee circuit court before a jury, and the counsel for plaintiff made his opening statement to the jury, in which he claimed and stated that the case before them was one of trover, in which plaintiff claimed certain property as the owner thereof, which was seized and taken from him by Mr. Morley, while acting as a deputy sheriff under Ancil K. Whitmore, who was then sheriff of Lenawee County, and he, Morley, claimed to have acted under a writ of execution issued out of the circuit court for the county of Lenawee, upon a judgment entered in said county against plaintiff and in favor of Frank Boss; that the principal business of the plaintiff at the time was that of farming, and that this property, under the law, was exempt from seizure on execution against the owner; and that said Morley did not permit the plaintiff to select his exemptions, or set them out to plaintiff. No other claim was made except such as arose from such seizure.

The plaintiff was then called as a witness in his own behalf, and testified that during the years 1885, 1886, and 1887 his principal business was that of a farmer. He was then asked what property he had upon his farm in the year 1887. This was objected to, for the reason that the declaration did not allege that the defendant was sheriff of Lenawee County at that time. This objection was sustained, and the court permitted the plaintiff to amend his declaration; and the first count of the declaration was amended by the insertion of the words inclosed in brackets. Upon his amendment being made, the court permitted the plaintiff to testify that he had upon the farm at that time the property seized and taken from him under the execution. The plaintiff also testified that Mr. Morley was a deputy sheriff of Lenawee County at that time. Plaintiff's counsel thereupon offered to show by the witness that the property mentioned in the declaration was taken by virtue of an execution by Mr. Morley; that he was deputy sheriff, acting under the defendant as sheriff of Lenawee County; and that the plaintiff demanded the property as exempt, within the term "stock," as used in subdivision 8 of section 27, chapter 266, Howell's Statutes, — that is, stock on the farm, — and that it was exempt to the plaintiff for that reason. The court refused to permit this testimony, for the reason, as stated, that the declaration did not make a case for the recovery of exempt property seized upon execution. Exception was taken to this ruling. The plaintiff thereupon

rested his case, and, the defendant offering no testimony, the court directed a verdict in favor of the defendant.

The only question for consideration is, whether the declaration states a cause of action for recovery of property which is exempt by statute from sale under execution. Section 27 (Howell's Stats., sec. 7686) provides: "The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court: . . . 8. The tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value \$250."

The contention upon the part of defendant's counsel in this court is, — 1. That the declaration does not state that the deputy holding the execution and levying it was the deputy acting under the defendant as sheriff of Lenawee County; 2. That the declaration does not state and show that the property levied upon and taken is of such a character that it would be exempt from sale on execution, under subdivision 8, above quoted.

The first point need not be discussed. It is stated in the declaration that the defendant, by his deputy or agent, James C. Morley, did convert and dispose of the said above-described property to his own use. This was a sufficient statement in the declaration to charge the defendant.

Upon the second point raised, counsel rely upon the case of *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589, in which it was stated by Mr. Justice Champlin that the plaintiff should have declared specially, setting forth the facts which showed the property exempt, and that the property was converted contrary to the provisions of the statute giving her the exemptions, referring to the same. The real question in controversy in that case was, whether, inasmuch as one of the partners had drawn from the firm assets one thousand dollars for her individual use, she could claim the statutory exemption out of the goods levied upon belonging to the partnership. It was held that this fact was not available to the defendant; that the dealings and adjustment between partners, or between partners and creditors, cannot be inquired into in such a collateral proceeding, and that the exemption of a partner does not depend upon whether he has drawn out more than his share of the firm assets; that such question can only be reached by an accounting and winding up of the copartner-

ship in equity. What was said in that case in reference to the declaration must be regarded as *obiter*.

In *Wyckoff v. Wyllis*, 8 Mich. 48, the suit was commenced by ordinary declaration in trover. The plaintiff was permitted to recover, as was the plaintiff in the case of *Stilson v. Gibbs*, 46 Mich. 215. We think the plaintiff had a right to introduce his testimony offered under either count of the declaration; but if the declaration had been in trover, in the usual form of such declarations, plaintiff would have had the right to show the facts necessary for a recovery for such property as under the statute is exempt from levy and sale on execution. It is the duty of an officer making a levy upon goods, any portion of which are exempt by law, to have an inventory and appraisal made, and permit the debtor to select, or, upon his neglect, to select for him, property to the amount allowed by law. Failing in this duty, the officer is liable to an action: *Wyckoff v. Wyllis*, 8 Mich. 48.

Of course, it is not the duty of an officer in levying upon property, no part of which is exempt under the laws, to make an inventory and appraisal, and call upon the defendant to make selection or to set out any exemptions; but where a part of the property is exempt, it has been held repeatedly by this court that it is the duty of the officer to make the inventory, and see that the exemptions are set out.

The principal question in controversy here resolves itself into this: Was any of the property levied upon exempt from sale under the claim made by the declaration? The declaration sets forth that the plaintiff's principal business was that of farming, and the property levied upon and taken consisted of hay, oats, corn, a yearling steer, a heifer, two spring calves, some clover-seed, and a quantity of cornstalks, amounting in all, according to the appraisal made upon the execution, to the sum of \$442. This, according to the testimony of the plaintiff, comprised about all the property then upon his farm. Out of this we are satisfied the plaintiff had a right to select from the appraisal two hundred and fifty dollars' worth. Constitutional and statutory provisions exempting property from execution are remedial, and are to be construed liberally and beneficially for the debtor. One engaged in any trade or occupation is entitled to an exemption, to be selected out of his stock in trade; and there is no more reason for holding such a stock exempt from levy and sale than in holding two hundred and fifty dollars' worth of the property here described as

necessary to the plaintiff in his business of farming, under subdivision 8 of section 27, above quoted. The court was in error in refusing to permit the plaintiff to show that his principal business was that of a farmer, what property he had upon the farm, and the necessity of this property, or any portion of it, to enable him to carry on his business of farming.

The judgment must be reversed, with costs, and a new trial ordered.

EXECUTIONS — TROVER FOR EXEMPT PROPERTY. — As to the debtor's remedies to vindicate infringements on right of exemption, see note to *Van Dresser v. King*, 75 Am. Dec. 645-653.

EXEMPTION, CLAIM FOR. — A debtor's right to property under the exemption law extends only to such as is appraised and set apart to him: *Hatch v. Bartle*, 45 Pa. St. 166; 84 Am. Dec. 484. The time for the debtor to elect whether he will retain real or personal property is after the appraisers have been summoned: *Bowman v. Smiley*, 31 Pa. St. 225; 72 Am. Dec. 738. A sheriff levying on several articles, one of which is exempt, is not liable in trespass therefor, where the debtor fails to elect before levy which of them he will claim as exempt: *McGee v. Anderson*, 1 B. Mon. 187; 36 Am. Dec. 570. The sheriff, whenever practicable, should, before he levies an execution, notify defendant of his having such execution; and defendant, upon such notice, must, if he claims exemption of his personal property and the land on which he resides until the rest of his property in the county is exhausted, furnish the officer with a description of his other property liable to sale on execution, or he will be deemed to have waived his rights under that statute: *People v. Palmer*, 46 Ill. 398; 95 Am. Dec. 418. Compare *Harrington v. Smith*, 14 Col. 376; 20 Am. St. Rep. 272. A sheriff or other officer has no right to take from a debtor, by virtue of process against him, his exempt property. In such case the officer levies on the property at his peril, and the law will not protect him; nor is the debtor compelled to submit to such trespass without reasonable resistance: *People v. Clements*, 68 Mich. 65; 13 Am. St. Rep. 373.

EXEMPTIONS — FARMERS. — A two-year-old heifer forward with calf is within the statutory provision exempting a debtor's only cow: *Dow v. Smith*, 7 Vt. 466; 29 Am. Dec. 202. A two-year-old heifer is exempt, whether with calf or not, if she is the only cow owned by the debtor: *Freeman v. Carpenter*, 10 Vt. 433; 33 Am. Dec. 210; *Carruth v. Grassie*, 71 Am. Dec. 707. The exemption of oxen, horses, or mules belonging to a farmer is intended to apply to such animals only as are suitable and intended for ordinary work conducted on a farm: *Robert v. Adams*, 38 Cal. 383; 99 Am. Dec. 413. But to exempt a horse, it is not necessary that he should have been broken to gear: *Noland v. Wickham*, 9 Ala. 169; 44 Am. Dec. 435.

WILLIAMS v. KEYES.

[90 MICHIGAN, 290.]

MORTGAGES — PAYMENT OF ASSIGNED MORTGAGE. — When a mortgagee assigns the mortgage and a negotiable note secured thereby, before maturity, and for a valuable consideration, and the mortgagor, without knowledge of such assignment, pays the mortgage debt to the administrator of the original mortgagee without requiring the production of the note and mortgage, such payment is no defense to foreclosure of the mortgage by the assignee.

MORTGAGES — ASSIGNMENT OF — RIGHTS OF ASSIGNEE. — The assignee of a mortgage and accompanying negotiable note, transferred before maturity and for a valuable consideration, takes the securities free of any equities existing between the original parties of which he had no notice.

MORTGAGES — PAYMENT OF ASSIGNED MORTGAGE — CONSTRUCTION OF STATUTE. — A statute reciting that "the recording of an assignment of a mortgage shall not, of itself, be deemed notice of such assignment to the mortgagor, so as to invalidate any payment made by him to the mortgagee," does not authorize the mortgagor to pay the mortgage to one not the holder of the negotiable note secured thereby, but it only means that the mortgagor shall not be required to search the record before making payment to the one *prima facie* entitled to receive it, who, in case the mortgage is accompanied by a negotiable note, is the holder thereof.

NEGOTIABLE INSTRUMENTS — ASSIGNMENT BEFORE MATURITY — RIGHTS OF PARTIES. — The maker of a negotiable note cannot assume that it has not been assigned or transferred, and, by making payment thereof before maturity to the original holder, defeat the rights of a purchaser for value before maturity.

Charles N. Legg, for the appellants.

H. H. Barlow, for the appellee.

MORSE, C. J. The complainant filed this bill to foreclose a mortgage.

The undisputed facts of the case are substantially as follows: The defendant Cyrus J. Keyes, in 1884, was a merchant in the village of Bronson, Branch County, in this state. He owned lot 1 of C. D. Randall's addition to said village. There was located upon said lot a wooden store building, in which he was doing business. This building was destroyed by fire that year. At this time he was largely indebted to C. L. Luce & Co., of Toledo, Ohio. C. L. Luce, of that firm, agreed to furnish the means to rebuild, and did so, putting up two brick stores upon the lot, with a partition wall between them, but communicating from the inside with one or more doors. The amount advanced by Luce was six thousand five hundred dollars. On December 18, 1884, Keyes gave his promissory note

to Luce for that amount, payable in three years from date, with interest at seven per cent, payable semi-annually, and Keyes and his wife, the defendant Sarah A. Keyes, executed and delivered to Luce a mortgage for the same amount upon the property as collateral security to said note. This is the mortgage being foreclosed in this suit. In October, 1885, C. L. Luce borrowed five thousand dollars of the complainant, and gave his note therefor, and also turned out to him the Keyes note and mortgage as collateral security to his note, but executed no written assignment of the same. C. L. Luce died September 15, 1886, and the defendants Arthur B. Luce and Clarence Brown were appointed his administrators. After this, Cyrus J. Keyes sent for Arthur B. Luce, who went to Bronson. It was found that Keyes was owing C. L. Luce & Co., including this mortgage indebtedness, about twelve thousand dollars. Keyes did not know that Luce had assigned or pledged this mortgage. An arrangement was made October 25, 1886, by which Keyes and wife made a deed to Arthur B. Luce and Clarence Brown, as administrators of the estate of C. L. Luce, deceased, and also turned over to them his stock of goods inventorying, at cost price, about three thousand eight hundred dollars. The deed described the property deeded as follows: "The two-story brick store and lot, being lot No. 1 of C. D. Randall's addition to the village of Bronson"; and contained the following clause: "This deed is made subject to a certain mortgage made and executed by Cyrus J. Keyes and Sarah A. Keyes to Charles L. Luce for six thousand five hundred dollars, and recorded in liber 17, on page 352, of Mortgages, Branch County, and is full payment of said mortgage."

On the same day, Cyrus J. Keyes made a deed to his wife, Sarah A. Keyes. The real estate conveyed was described in said deed as follows: "The brick store and lot situated on the north side of Chicago Street, and known as lot No. 1, and a fractional part of lot No. 2, of C. D. Randall's addition to the village of Bronson."

In connection with these two deeds, it may be stated that it is admitted in the record that at the time the mortgage was made, and before the brick stores were built, in order to make a better line between lots 1 and 2, measurements had been taken, and Sanborn, who owned lot 2, had agreed to deed to Keyes a wedge-shaped piece of land off from the north end of the west side of lot 2, in exchange for a wedge-shaped piece

to be deeded to him by Keyes from off the east part of the south end of lot 1. The stores were built so as to correspond with this new line, and it is stipulated by the parties that whatever decree is made, it shall be in accordance with such line, as deeds have since passed between Sanborn and Keyes, carrying out their verbal agreement to exchange lands as aforesaid.

The defense to this foreclosure is, on the part of the defendants Cyrus J. and Sarah A. Keyes, that it was intended to deed only one of these brick stores, to wit, the west store, and that the east store was never intended to be deeded to Luce and Brown, and that they have never had possession of it, and that by the execution of the deed to them the mortgage was paid and released as against said east store property. It is not claimed that the note and mortgage were in the hands of Arthur B. Luce when this deed was made, but Keyes testifies that Luce promised to discharge the mortgage. He is corroborated by the justice of the peace, Seth Monroe, who drew the deeds to Luce and Brown, and also the deed to Sarah A. Keyes. Arthur B. Luce denies that the deed was intended to cover only the west store, and says further, that he took the deed, not as an absolute conveyance in payment of the mortgage, but as additional security to his mortgage and other debts owing to C. L. Luce & Co., and also to aid Keyes in preserving his property from other creditors, to whom Keyes was owing three thousand dollars and upwards. Luce says in his answer that the goods received at the time the deed was made were not sufficient to pay the indebtedness of Keyes to C. L. Luce & Co., nor would the real estate covered by the mortgage, if sold at a fair price, be sufficient to realize an amount sufficient to pay such indebtedness; but that he and Brown, as administrators, are anxious to come to an accounting with Keyes, and that if from the sale of such real estate there should be more than sufficient to pay such indebtedness, they are desirous it should be paid over to said Keyes; and they ask the same relief as though they had filed a cross-bill, and that an accounting may be had with said Keyes.

The amount found to be due upon the mortgage by the court below on the twenty-third day of May, 1891, the date of its decree, was \$8,127.89, and the amount due to the complainant upon the note of Charles L. Luce to him was decreed to be at the same date \$5,063.76. The decree was in favor of the complainant in this last-named amount, and the usual sale in

foreclosure cases was ordered of the whole premises, if said sum, with interest at seven per cent, was not paid on or before the first day of July, 1891. The surplus, if any, upon such sale was ordered to be deposited in court to abide the further order of said court. The defendants Cyrus J. and Sarah A. Keyes appeal from this decree.

The fact that the deed to Luce and Brown recites that it is in full payment of the mortgage, and the further fact that a deed was made by Keyes to his wife the same day, which differed in its description from the other deed in its reference to lot No. 2, raise a strong presumption that the claim of Keyes, that only the west store was to be conveyed by this deed, is true. Monroe also swears positively that this was the intention of the parties, and that if he had known that there were two stores on lot 1, he would have been more specific in his description of the land conveyed. It would also appear that Keyes or his wife has always retained possession of the east store, and had the rents and profits of the same.

But it is unnecessary to determine or discuss this question. The note made by Keyes to C. L. Luce was a negotiable one, and was transferred to complainant before due, and for a valuable consideration. Under the previous rulings of this court, he took this mortgage free from all equities of which he had no notice between Luce or his administrators and Keyes; and any payment made to Arthur B. Luce, or arrangement between him and Keyes, after the note and mortgage were transferred to complainant, could not affect the latter's rights in the premises: See *Reeves v. Scully*, Walk. Ch. 248; *Dutton v. Ives*, 5 Mich. 515; *Helmer v. Krolick*, 36 Mich. 371; *Judge v. Vogel*, 38 Mich. 568. After the assignment of the mortgage and indorsement and delivery of the note to complainant, and before maturity, the defendants assumed to pay the note and mortgage to the administrators of the original mortgagee, without requiring the production of the note; and the only question here is, Could they thus discharge the note and mortgage, so as to defeat the right of a good-faith purchaser? The statute (Howell's Stats., sec. 5687) provides that "the recording of an assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee."

This statute has no application whatever to the present case. It was not intended to authorize the mortgagor to pay

the mortgage to one not the holder of the note; but if a payment be made to one who, by the possession of the evidence of debt, shows himself *prima facie* entitled to receive payment, or, in case of non-negotiable security, if the payment be made to the original holder, the fact that an assignment has been placed of record will not, of itself, invalidate a payment made in good faith to such apparent owner. The statute means no more than that the mortgagor shall not be required to search the record before making payment to the one *prima facie* entitled to receive it. In case of negotiable securities, the holder alone is the one *prima facie* entitled to receive payment. Neither under the statute nor under the law merchant can the maker of a negotiable note assume that it has not been transferred, and made payment thereof before maturity to the original holder, and thus defeat the right of a purchaser for value before maturity. The case of *Dutton v. Ives*, 5 Mich. 515, is directly in point. See also 2 Daniel on Negotiable Instruments, sec. 1233, and cases cited. It is conceded that complainant had no notice or knowledge of this alleged agreement between Arthur B. Luce and Keyes that this mortgage should be released upon the east store.

The decree of the court below must be affirmed, with costs.

MORTGAGES — RIGHTS OF ASSIGNEE OF MORTGAGE NOTE. — The indorsee of a promissory note secured by mortgage succeeds to the benefits of the mortgage security, even though the latter be not formally assigned: *Connecticut Mutual Life Ins. Co. v. Talbot*, 113 Ind. 373; 3 Am. St. Rep. 655, and cases cited in note; *Solinsky v. National Bank*, 82 Tex. 244; *Farrell v. Lewis*, 56 Conn. 280. The same rule prevails where there is an assignment of a portion of the mortgage debt. In equity such assignment carries with it a corresponding interest in the mortgage security: *Miller v. Rutland etc. R. R. Co.*, 40 Vt. 399; 94 Am. Dec. 413. A note indorsed in blank being payable to bearer, a mortgage securing such note will follow the transfer of the note with the full effect of a regular assignment: *Storch v. McCain*, 85 Cal. 304. The assignee of a note secured by mortgage may enforce the lien by foreclosure proceedings: *Hamblen v. Folts*, 70 Tex. 132; *O'Neil v. Seixas*, 85 Ala. 80. Where a negotiable note secured by mortgage is transferred without an assignment of the mortgage, the indorsee may attach the equity of redemption, and sell the same under execution, in an action against the promisor: *Crane v. March*, 4 Pick. 131; 16 Am. Dec. 329. (The assignee of a negotiable note so secured, who takes it for value, before maturity and without notice, holds it discharged of all equities between the original parties: *Crosby v. Roub*, 16 Wis. 616; 84 Am. Dec. 720; *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 638; *Barnum v. Phenix*, 60 Mich. 388.) But until the mortgage is recorded, such transfer will not affect the absolute title of an innocent purchaser of the premises: *Lewis v. Kirk*, 28 Kan. 497; 42 Am. Rep. 173. Nor, after the note is barred by the statute of limitations, and

the mortgage remains as the only security capable of being enforced in law, can the holder any longer invoke the commercial rule that protects him as indorsee of the note, but must stand upon the equity rule governing purchasers for valuable consideration without notice. Under this rule, the holder is not protected from existing equities, where the consideration of his purchase was a past-due debt: *Deurman v. Trimmer*, 26 S. O. 506.

NEGOTIABLE INSTRUMENTS. — Payments made on note before maturity cannot be offset against *bona fide* holder for value, whose title accrued before note became due: *Harrison v. Edwards*, 12 Vt. 648; 36 Am. Dec. 364.

MORTGAGES — ASSIGNMENTS — PAYMENT OF ASSIGNED MORTGAGE. — A *bona fide* indorsee of a negotiable note, and assignee of a real mortgage executed as security therefor, is not prejudiced by a conveyance of part of the mortgaged premises, thereafter made without his knowledge or consent by the mortgagor to the mortgagee, although the assignment is not recorded, and a statute provides that the recording of the assignment of a mortgage shall not be deemed notice to the mortgagor, so as to invalidate payments to the mortgagee: *Burhans v. Hutcheson*, 25 Kan. 625; 37 Am. Rep. 274.

WILLIAMS v. CLINK.

[90 MICHIGAN, 297.]

EVIDENCE — ERRONEOUS ADMISSION OF. — To permit a party to prejudice the jury by giving improper and immaterial statements in evidence is reversible error.

EVIDENCE — RIGHT TO EXPLAIN EXECUTION OF MORTGAGE. — When a chattel mortgage executed by defendant to plaintiff, and tending to support the claim of the latter, is called to the attention of the defendant, on his cross-examination, by showing it to him, he cannot be deprived of the right to explain its execution by a refusal on the part of the plaintiff to offer it in evidence, and after such explanation is made, it is error to refuse to receive it in evidence.

MORTGAGE TO DEFRAUD CREDITORS — RIGHT OF MORTGAGOR TO DISPUTE VALIDITY OF. — In an action by a mortgagee to enforce a mortgage, the mortgagor may successfully dispute its validity by showing that it was given without any consideration, and for the purpose of defrauding his creditors.

FRAUDULENT CONVEYANCES — ENFORCEMENT OF. — When a conveyance is executed to defraud creditors, and is without consideration as between the parties, the law will not aid either of them, but will leave them where they have put themselves, without relief. If the contract or conveyance is executory, it will not be enforced, and if executed, it will not be relieved against. If it has been performed in part, it will be given effect so far as executed, and held void so far as it remains unexecuted.

F. W. Cook, for the appellant.

Stephen H. Clink, for the appellee.

MORSE, C. J. The plaintiff brought replevin in the Muskegon circuit court for certain law books and office furniture,

under a chattel mortgage which he claimed to hold against the property. The defendant claimed that the mortgage was given without consideration. The jury found for the defendant, who waived a return of the property, and had judgment for its value in the sum of \$899.91.

The mortgage was executed September 2, 1886, for the sum of one thousand dollars, and had been duly renewed each year. It was claimed by the plaintiff that the property was mortgaged in 1884 to the administrators of one Allen for the greater part of the purchase price. Defendant had no money to meet the first payment upon said mortgage, and on the 24th of March, 1884, applied to plaintiff for a loan of money for that purpose. At the time, he was owing plaintiff \$65, and plaintiff gave him a check for \$435, making \$500 in all. When the second payment came due, and on September 2, 1886, the plaintiff gave defendant a check for \$750, making the total indebtedness of defendant to plaintiff \$1,250. The next day, defendant telephoned plaintiff that he had executed the mortgage and filed it. Afterwards, plaintiff found that the mortgage was for only one thousand dollars. He spoke to defendant about it, who said he expected some money and would pay the \$250 in cash.

The defendant claimed that the check for \$435 was paid to him for legal services rendered for plaintiff, and that although he used the check for \$750 on September 2, 1886, he returned the money to plaintiff on the next day from the proceeds of a note made by defendant and indorsed by plaintiff, and that he gave this mortgage, not to pay or secure any debt to plaintiff, but to prevent an execution from being levied upon the property.

Complaint is made that the defendant was permitted to prejudice the jury against the plaintiff by improper and immaterial statements. The complaint is justly made. While the defendant was testifying to the legal services that he performed for plaintiff, in payment of which he claimed the \$435 check was given, his counsel asked him the following question: "Don't you remember that Timothy Bresnahan, the sheriff, levied upon a lot of his [plaintiff's] liquor down there?" Defendant answered: "There was a lot of them. That was a case where Mr. Williams instructed me, — to use his own language, — where he wanted me to give Dunn hell. That was the expression that he used. And he said: 'Any time you can make Dunn pay five dollars by paying ten, the money is

ready. I am willing to spend ten dollars any time I can make Dunn spend five.' That is the instructions he gave me in that case."

Plaintiff's counsel moved to strike out all of the answer after the words "There was a lot of them," but the court denied the motion. This was error, and there is no excuse for the defendant, who is a lawyer, that can palliate the error. The judgment ought to be reversed for this cause alone. The record, however, is full of remarks and insinuations by the defendant, both off and on the witness-stand, as to matters entirely irrelevant to the issue, and which manifestly could have but one purpose and effect, and that to prejudice the jury against the plaintiff.

The attention of the defendant, on his cross-examination, was called to the execution by him of a chattel mortgage for \$500 to plaintiff on the day that he received the check of \$435, to wit, March 24, 1884. He had no recollection of any such mortgage. He was shown the mortgage, and then admitted that he made it. The mortgage was on his interest in a shingle-mill, and it was claimed by plaintiff that defendant offered it to him as security for the five hundred dollars which defendant then owed him, but plaintiff would not take it, as he did not consider it good security, but defendant went away and left it on plaintiff's desk. Defendant claimed that he had forgotten all about the mortgage, and wanted to consult with his attorney. After doing so, he returned to the witness-stand and gave an explanation of the mortgage, claiming it was offered to plaintiff in another and altogether different matter. Plaintiff objected to defendant's explanation about the mortgage, as it had not yet been offered in evidence. There was no error in this. Plaintiff could not use a paper in this way, and then deprive defendant of his right to explain in reference to it, by not offering it in evidence. But the court erred in not receiving the mortgage in evidence, it being offered after defendant had made his explanation.

It is also alleged as error that the court instructed the jury that although they found that defendant gave the one-thousand-dollar mortgage to plaintiff, not as security for a debt, but for the purpose of hindering and delaying his creditors, he was not estopped by such fraudulent intent and conduct to dispute the validity of the mortgage in this suit. There was no error in this instruction. The precise question involved

in this case was ruled in *Judge v. Vogel*, 38 Mich. 569. In that case, the defendant insisted that the mortgage was executed and intended as a fraud upon creditors of the mortgagor, and to cover property for his benefit. Cooley, J., in rendering the opinion for the full court, said: "The question, therefore, seems to be this: whether one who gives a mortgage without consideration, in order to defraud creditors, is estopped from disputing a full consideration when the mortgage has passed into the hands of a purchaser. A mortgage fraudulent as against creditors may be avoided, at their option; but how the intended fraud upon them can give it validity as to others is not explained in the briefs. The right of the creditors is to defeat it; but there seems to be no necessary relation between a right of one man to defeat it as a fraud upon him, and a right of another to affirm it because of the same fraud. The fraud which should give one rights must be a fraud which in some way concerns his own interest. . . . There was consequently no error in the court refusing the instruction prayed."

The case of *Bassett v. Shepardson*, 52 Mich. 3, is clearly distinguishable from the case of *Judge v. Vogel*, 38 Mich. 569. In the case of *Bassett v. Shepardson*, 52 Mich. 3, the attempt was made to impeach an executed agreement by showing that it was made with intent to defraud the grantor's creditors.

The rule in relation to a conveyance to defraud creditors, and without consideration as between the parties, is, that the law will not aid either of the persons committing or attempting the fraud, but leave them where they have put themselves, without relief. If the contract is executory, it will not be enforced; and if executed, it will not be relieved against. If it has been performed in part, the law gives it effect in so far as executed, and holds it void in so far as it remains unexecuted: See *Quirk v. Thomas*, 6 Mich. 77, per Manning, J.

The plaintiff in this case is undertaking to enforce, if defendant's evidence be true, a mortgage executed solely to defraud defendant's creditors; and although the law does not look kindly upon the pleading of one's own fraud as a defense, it seems to be permitted, upon grounds of public policy, when the contract sought to be enforced is illegal, and the plaintiff is a participant in the fraud.

The judgment is reversed, and a new trial granted, with costs of this court to plaintiff.

FRAUDULENT CONVEYANCES. — RELATIVE RIGHTS OF THE PARTIES, THEIR HEIRS, PRIVIES, ASSIGNEES, ETC.: See note to *Whitworth v. Thomas*, 3 Am. St. Rep. 727-745. As to when grantor may be relieved, see notes to *Harper v. Harper*, 7 Am. St. Rep. 587, 588; *Carll v. Emery*, 12 Am. St. Rep. 517, 518. In addition to the cases cited in the above notes, which recognize the principle that conveyances fraudulent as to creditors are valid between the parties, the following may be mentioned: *Weatherbee v. Cockrell*, 44 Kan. 380; *Herndon v. Reed*, 82 Tex. 647; *Stephens v. Adair*, 82 Tex. 214. The rules governing an action against a fraudulent grantee are different from those applicable to an action brought by him. In an action of the latter class, the court might leave him entangled in the toil which he himself had woven. But when he is a defendant, pursued for the purpose of an accounting, such accounting will be controlled by equitable principles, and he may be allowed as offsets expenditures necessarily made by him for the preservation of the property, or for the discharge of pre-existing liens thereon: *Loos v. Wilkinson*, 113 N. Y. 485; 10 Am. St. Rep. 495. Debtor who transfers property, with intent to delay and defraud his creditors, to a third person with knowledge of the fraud, upon an agreement that the proceeds shall be accounted for by him, may, after notice to such third person of the abandonment of his fraudulent purpose and demand of repayment, recover from him such proceeds for the benefit of his creditors: *Carll v. Emery*, 148 Mass. 32; 12 Am. St. Rep. 517. Land fraudulently conveyed becomes subject to the debts of the fraudulent grantee: *Keel v. Larkin*, 83 Ala. 142; 3 Am. St. Rep. 702.

RASCHER v. EAST DETROIT AND GROSSE POINTE RAILWAY COMPANY.

[90 MICHIGAN, 412.]

STREET-RAILWAYS — RIGHT TO DRIVE ON TRACK. — A person is not negligent nor a trespasser in driving upon a street-railway track in the night time. He has the same right to travel upon it as the railway company, save that it is his duty, when he meets a car, to get off and give the car precedence.

STREET-RAILWAYS — RIGHT TO USE OF STREET. — The right of a railway in a street is only an easement to use the highway in common with the public. It has no exclusive right of travel upon its track, and it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle.

STREET-RAILWAYS — COLLISION WITH VEHICLE — NEGLIGENCE FOR JURY TO DETERMINE. — In an action to recover for injury received in a collision with a car while driving upon a street-railway track in the night-time, the question of reasonable diligence and ordinary care to prevent collision on the part of the plaintiff, and of negligence on the part of the railway company, is for the jury to determine, under evidence showing that the car was not lighted, and was running at the rate of fifteen or twenty miles an hour, and that the plaintiff and another person, a short distance behind him, did not see the car until the collision was inevitable.

STREET-RAILWAY — COLLISION WITH VEHICLE — EVIDENCE OF NEGLIGENCE. — In an action to recover for injury received in a collision with a car

while driving upon a street-railway track in the night-time, evidence is admissible to show that the public were in the habit of driving and traveling upon such track, as bearing upon the question of negligence in running a car at night without any head-light, or other light of any kind.

STREET-RAILWAYS — DUTY TO PREVENT COLLISION. — As between a street-car company and the driver of a wagon or omnibus, the duty rests upon the company to furnish its cars with light at night, or give warning signals of approach, and if it fails in this duty, and does not run its cars so slowly as to avoid collision, it is guilty of negligence, if the driver of the vehicle exercises reasonable and ordinary care.

STREET-RAILWAYS — RIGHT TO USE OF STREET — DUTY TO AVOID COLLISION. — The superior right of a street-railway company to the use of that portion of the highway designated for its use must be exercised with due caution and regard for the rights of travelers thereon; and the fact that it has a prescribed route does not alter its duty to the public, who have a right to travel upon its track until met or overtaken by its cars.

A. H. Wilkinson, for the plaintiff.

William H. Wells, for the appellee.

MORSE, C. J. Action for negligent injury. The case was taken from the jury by the circuit judge on the ground of the contributory negligence of the plaintiff.

The evidence shows that the defendant operates an electric street-car line on Mack Street, in the city of Detroit; that its track is laid in the center of the street, and on the crown of the road-bed, at the place where the accident occurred. The street is bad for driving, there being deep ditches on each side of the street; and the best place to drive a team is on the railway track.

Plaintiff resided on this street, and on November 27, 1889, was being driven home by her husband from the place where he worked. The vehicle was a top-buggy, drawn by one horse. At this time the electric railway had been in operation four or five months. Plaintiff and her husband came onto Mack Street at its intersection with Gratiot Avenue. When they reached Mack Street, the husband testified that he looked to see if a car was coming, and did not see any. He could have seen an approaching car with head-light a mile and a half or two miles from where he looked. They drove on the track all the way. The husband saw no light or car until his wife exclaimed, "O Herman, there is the car!" The horse was then on his hind feet, and he undertook to "lash him" off the track. The horse and front wheels got off, but the car struck the left hind wheel of his buggy, throwing the plaintiff out and injuring her. There was no head-light on the car, and it

was dark. The car was not lighted at all, either inside or out. It was running at the rate of fifteen or twenty miles an hour. Before this time the cars upon that line were in the custom of using head-lights when running after dark. The plaintiff herself testified that when they got to Mack Street she looked up the street, and could see no car or light. After she started she did not look particularly for a car, as she thought, if there was one coming, they could see the light in time to avoid it. The first she knew of the approach of the car she saw a little blue flame on the trolley-wire; then she saw the glass glitter in the car-window, and called to her husband, who at once attempted to get out of the way.

The plaintiff was not negligent in driving upon this railway track. She had the same right to travel upon it as the railway company, save that it was her duty, when she met a car, to get off and give the car precedence. But she was not a trespasser upon the track in any sense. The right of the railway in the street is only an easement to use the highway in common with the public. It has no exclusive right of travel upon its track, and it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle: *Beach on Contributory Negligence*, sec. 89; *Adolph v. Central Park etc. R. R. Co.*, 65 N. Y. 554; *Government Street R. R. Co. v. Hanlon*, 53 Ala. 81; *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 428.

The question whether, being on the track, the plaintiff and her husband used reasonable diligence and ordinary care to prevent collision was one for the determination of the jury: *Little v. Street R'y Co.*, 78 Mich. 205. The testimony shows that another person, some distance behind the plaintiff, did not see or hear the car until it was right upon plaintiff, and such was its speed that he was also unable to get away, and had his rig upset.

We think it was admissible to show, on behalf of the plaintiff, that the public were in the habit of driving and traveling on the railway track, as they had a perfect right to do, as bearing upon the question of defendant's negligence in running a car without a head-light, or any light at all, upon this street after dark.

It is the contention of defendant's counsel that a street-car is a vehicle, the same as a wagon or omnibus, and is no more bound than any other vehicle to carry a head-light, or to give signals or warnings of its approach, and that there is no

stronger reason why street-cars should carry head-lights as signals to other travelers than other vehicles.

This is not the law. A street-car can neither turn to the right nor left. It runs with greater rapidity and with greater momentum than a wagon or omnibus; therefore greater caution must be taken in its running, to avoid collision. It ought to be lighted in the night-time, so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else give, by some signal, warning of its approach. Street-cars have precedence, necessarily, in the portion of the way designated for their use. This superior right must be exercised, however, with proper caution and due regard for the rights of others; and the fact that it has a prescribed route does not alter the duty of the defendant to the public, who have a right to travel upon its track until met or overtaken by its cars.

The question of defendant's negligence under the testimony in this case was for the jury.

The judgment is reversed, and a new trial granted, with costs of this court to plaintiff.

STREET-RAILWAYS. — A cable railway company is in law bound to know that men, women, and children have an equal right to the use of the highway, and will be upon it, and its servants are bound to be on the look-out, and to take all reasonable precautions to avoid injuries to persons who may be upon the streets: *Winters v. Kansas City R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; *Hays v. Gainesville Street R'y Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; *Anderson v. Minneapolis Street R'y Co.*, 42 Minn. 490; 18 Am. St. Rep. 525; *Weissner v. St. Paul etc. R'y Co.*, 47 Minn. 468; *Swain v. Fourteenth Street R. R. Co.*, 93 Cal. 179. As to the duty of the driver of a street-car to keep a look-out at crossings, see *Strutzel v. St. Paul R'y Co.*, 47 Minn. 542.

LE COMPTE v. LUEDERS.

[90 MICHIGAN, 495.]

BOUNDARY OF TOWN LOTS. — Purchasers of town lots have the right to locate their lot lines according to the stakes set by the plat of the lots, and no subsequent survey can unsettle such lines. The question afterwards is, not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is, whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case, they must govern, notwithstanding any errors in locating them.

J. E. Sullivan, for the appellant.

De Long and O'Hara, for the appellee.

LONG, J. This action of trespass was commenced in justice's court, where plea of title was interposed, and the cause certified to the circuit. Upon trial there, defendant had verdict and judgment.

The parties are the owners of adjoining lots of land in McGraft and Montgomery's addition to the village of Lakeside, now a part of the city of Muskegon. Plaintiff owns and is in possession of lot 2, block 5, and the defendant owns and is in possession of lot 1 of the same block. The two lots adjoin, and the action grows out of a dispute as to the true boundary line between the lots.

Block 5, with other property, was platted by McGraft and Montgomery, as an addition to the village of Lakeside, in the year 1879. Mr. John B. Smalley made the surveys from which the plat was made, and drove cedar stakes at that time, indicating the corners of the lots. During the fall of 1879, Charles H. De Puy, then in the employ of McGraft and Montgomery, built a fence according to stakes then standing, indicating they had been placed by a surveyor, inclosing all of said block, excepting two lots immediately south of those in controversy. The next spring, lot 1 was purchased by a Mr. Ault from McGraft and Montgomery, and it is from him that the defendant claims title to that lot by mesne conveyances. After Ault purchased, Mr. De Puy, who was still in the employ of McGraft and Montgomery, built a line fence between the lots 1 and 2. This fence was partly destroyed by fire upon two different occasions, but built again upon the same line, the posts being put in the same place as the partly burned posts. The last fence was built of upright boards the whole length of the line between the two lots, but on the same line occupied by the first fence built there. This fence was standing at the time defendant, Lueders, purchased lot 1. The plaintiff purchased lot 2 in January, 1890, with this high board fence still standing as the boundary between the two lots. Plaintiff went into possession under his deed, and while so occupying lot 2, defendant, Leuders, who was making some repairs to a building on his lot, ordered his carpenters to remove this fence between the lots, which they did, about three feet westward upon plaintiff's lot, thus fencing in with defendant's lot about three feet in width on the east side

of plaintiff's lot. Plaintiff had planted along the east side of his lot a quantity of strawberry-plants, which defendant's carpenters took up, and put over farther on plaintiff's lot. It is for this trespass that this action is brought. Upon the trial the court submitted the question to the jury as to where the true boundary line was, and they found a verdict in favor of defendant.

Thirty assignments of error are contained in the record, based upon the rulings of the court during the trial, the giving and the refusing to give certain requests to charge, and the charge of the court as given. We do not deem it important to discuss any of them, except the refusal of the court to give the plaintiff's third request to charge, as follows: "If you find that on the first survey stakes were set at the terminations of the lines between the lots front and rear, and a fence was built between the lots while these stakes were in place, on the line indicated by these stakes, and if you find from the evidence that a fence was continued on said line until the parties to this suit bought the two lots, then I charge you as a matter of law that that fence was the boundary line between Le Compte's and Lueder's lots; and if you find from the evidence that Henry Kooi, the carpenter working for Lueders, pulled down the fence, or any part of it, and placed it on the Le Compte lot, then I charge you that your verdict must be for the plaintiff."

This request embodies the only question involved in this controversy, and should have been given. The case falls directly within the ruling of this court in *Flynn v. Glenny*, 51 Mich. 580. It was expressly held in that case that purchasers of town lots have the right to locate their lot lines according to the stakes set by the platter of the lots, and that no subsequent survey can be alleged to unsettle such lines. It was said by Mr. Justice Cooley in that case: "The question afterwards is, not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is, whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case, they must govern, notwithstanding any errors in locating them."

The judgment must be reversed, with costs, and a new trial ordered.

BOUNDARIES. — Survey actually made governs location of land granted with reference to plan, if such survey can be ascertained: *Heaton v. Hodges*, 14 Me. 66; 30 Am. Dec. 731. Similarly, a new survey will not prevail as to location of quarter-section corners over direct testimony of witnesses who saw corners located by the original survey: *Mills v. Penny*, 74 Iowa, 172; 7 Am. St. Rep. 474. The survey as actually made may always be shown by any legal evidence, when in fact the lines were run on the ground: *Johnson v. Archibald*, 78 Tex. 96; 22 Am. St. Rep. 27. These rulings are special applications of the universal principle according to which boundaries are established, viz., that monuments, whether natural or artificial objects, are allowed to dominate courses and distances: *Crampton v. Prince*, 83 Ala. 246; 3 Am. St. Rep. 718. See, generally, as to this subject, the note to *Heaton v. Hodges*, 30 Am. Dec. 737-741. The results of several recent cases in which the above principle was applied are here summarized. In description of lands, monuments control distances, where there is an inconsistency between the two as given in a deed: *Andreu v. Watkins*, 26 Fla. 390; and, provided the monuments are fully identified, are sufficient in themselves to show the boundaries: *McCullough v. Absecon etc. Co.*, 48 N. J. Eq. 170; and this is so without regard to whether in fact the monuments were seen by the parties to the deed or not: *Anderson v. Richardson*, 92 Cal. 623. Therefore a call for a beginning corner, that corner being established, requires the line to be run to that point, irrespective of the distance named in the call: *Cowles v. Reavis*, 109 N. C. 417; and if, at the distance called for, the surveyor established a line or corners, while calling for an open line not reached, the actual line and corners established will control, and the call for the open line be disregarded: *Baker v. Light*, 80 Tex. 627. So, also, although a line which is given as running between two points is presumed to be straight, yet where a reference is made to a survey which shows the line not to be a straight one, that survey will control: *Seneca Nation v. Hugaboom*, 132 N. Y. 492. It is always competent, for the purpose of showing lines and boundaries, to prove where the surveyor actually ran: *Euliss v. McAdams*, 108 N. C. 507; and where the deed refers to artificial monuments, it is not error to allow them to be identified by admitting as evidence a written contract by a former owner of the land with one of the grantees to convey the land as soon as a proper survey could be made, together with parol evidence that a surveyor was selected by the parties to make the survey; that he located on the ground the stakes referred to in the deed; that the description given in the deed was made from the report of his survey; and that the deed was executed in performance of the agreement to convey; and further evidence to identify the location of the stakes set in making the survey: *Anderson v. Richardson*, 92 Cal. 623.

**CARSON CITY SAVINGS BANK v. CARSON CITY
ELEVATOR COMPANY.**

[90 MICHIGAN, 550.]

CORPORATIONS — ULTRA VIRES — ESTOPPEL. — When the stockholders in a corporation sign its articles of association with knowledge that the object of the corporation is to engage in a certain specified business in which it does engage, and it incurs liability for which it is sued, it cannot plead in defense that it has no authority under the law to engage in such business.

CORPORATION — ULTRA VIRES — ESTOPPEL. — The plea of *ultra vires* should not prevail, as a general rule, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.

Ellsworth and Rarden, John Lewis, and George H. Cagwin,
for the appellant.

McGarry and McKnight, for the appellee.

MORSE, C. J. The plaintiff is a corporation duly organized under the laws of this state February 1, 1887. The defendant is a corporation organized May 2, 1887, under act No. 26, Laws 1867, entitled "An act to provide for the incorporation of associations for the purpose of constructing, owning, and controlling warehouses for the storage of grain and other commodities."

Every stockholder in the plaintiff company at the time of its organization was also a stockholder in the defendant company at the time of the latter's organization. There were but two of the stockholders of the defendant company not stockholders of the plaintiff corporation, to wit, C. J. Rumsey and Patrick M. Fox.

Article 2 of the articles of the association of the defendant shows the object of the corporation, to wit: "The purpose or purposes of the corporation are as follows: For the purpose of constructing, owning, and controlling warehouses for the purpose of buying, selling, handling, and storing all kinds of grains, fruits, vegetables, wool, lime, coal, salt, and other commodities."

Plaintiff sued upon certain promissory notes signed by the defendant company as follows: "Carson City Elevator Co., M. J. Miner, Mgr." The defense to these notes seems to have been that Miner had no authority to make them, and that the findings of the court fail to show that they were given for any legitimate business of the corporation; that such findings do

not show that said notes, or any of them, were given for the building or operating of a warehouse or elevator, or that they were not issued in the illegitimate business of buying and selling grain.

The circuit judge finds, among other things, that on the day the company was organized "directors were duly chosen and officers duly elected, and on the same day the following proceedings were had and taken by the board of directors of said company:—

"At a meeting of the directors of the Carson City Elevator Company, held May 2, 1887, at the Savings Bank in Carson City, the following named persons were elected as its officers: S. W. Webber, president; E. Middleton, vice-president; Chas. H. Morse, secretary; and L. L. Trask, treasurer and general manager. Upon motion of Chas. H. Morse, the following resolutions were adopted: "Resolved, that L. L. Trask is hereby appointed manager of the Carson City Elevator Company, with authority to complete the elevator building of said company, to buy and sell grain and other produce and property pertaining to the business of said company, to borrow money for the use of said company, and pay out the same in the business of the company, subject to the control and approval of the board of directors of said Carson City Elevator Co." Meeting adjourned. L. L. TRASK, Clerk.'

"The defendant, after its organization, proceeded to erect an elevator, and carry on the business of buying, and storing, and selling grain, borrowing money from the plaintiff with which to build its elevator and conduct its business operations. No capital stock was paid in at the time of the organization of the defendant, and only eighteen hundred dollars of its capital stock has ever been paid in. A few only of its stockholders paid their subscriptions.

"In order to carry on its operations, the defendant was accustomed to and did borrow money from the plaintiff by giving its notes to the plaintiff, signed by it, per L. L. Trask, manager. The business was not profitable, and a large indebtedness was created with the plaintiff.

"May 7, 1888, the defendant elected the following directors as its officers: C. W. Middleton, president; M. J. Miner, vice-president; C. J. Rumsey, secretary and treasurer. At the same meeting the following action was taken: 'Moved by F. W. Kelley, and supported by E. W. Middleton, that M. J.

Miner be hired as long as he gives satisfaction, at a salary of eight hundred dollars per year. Carried.'

"Immediately upon this appointment of Mr. Miner, he at once assumed the duties previously performed by L. L. Trask, the general manager, and the latter at once ceased to exercise any duties in behalf of the defendant. The indebtedness existing with the plaintiff, which had been previously contracted by the defendant, and was represented by promissory notes signed by the defendant, per L. L. Trask, general manager, falling due in the course of time, were renewed by other notes given by the defendant by the said Miner, who signed the same with the name of the defendant, per M. J. Miner, manager. The notes in suit were negotiated by the secretary and treasurer of the company, and they all form a portion of a series of renewals of the original indebtedness. The officers of the company knew of the existence of the indebtedness from defendant to the plaintiff, and knew the manner in which said indebtedness was renewed from time to time. They also knew the manner in which the business of the defendant was being conducted. No objection was ever raised by the defendant or any of its officers to the authority of Mr. Miner to bind it or give notes signed by him as manager, until this suit was brought. The president of the defendant, Mr. Middleton, who resided at Greenville, Michigan, was aware of the manner in which Mr. Miner was performing the duties for the defendant, and frequently honored drafts drawn on himself by said Miner in the purchase of grain and in the payment of the same, in the manner in which Mr. Miner was signing the commercial paper of the defendant. The defendant also borrowed money at Greenville and Ionia banks by giving its notes, signed by Mr. Miner as manager. These notes were paid. The defendant permitted Mr. Miner to appear as possessing competent authority to give the notes in suit in the manner in which they were executed. It was distinctly conceded and admitted on the trial that the defendant was a corporation. No question was made on the trial as to its existence and due incorporation.

"There was no testimony introduced tending to prove any fraud on the part of Mr. Miner in the giving of the notes, and the money loaned by the plaintiff to the defendant was used in the business of the defendant.

"I therefore conclude, as a matter of law, that, whether Miner had authority or not to execute the notes in suit, the

defendant is estopped from questioning his authority, and that the plaintiff is entitled to judgment in the sum of \$9,024.67."

The court was correct in its conclusion of law. Whether the company was authorized to buy and sell grain under its charter and by virtue of the act under which it was incorporated is immaterial. Its articles of association distinctly set out its purpose to be to engage in the buying and selling of grain and other commodities. It may be that it could not organize under the act of 1867 for as broad a purpose as this, and that its legal franchise, if tested, would be confined to the constructing, owning, and controlling of warehouses and elevators for storage, but that is a matter to be determined by the interposition of the public through the attorney-general. Every one of these stockholders signed the articles of association, and knew that the object of this company was to engage in the buying and selling of grain and other commodities, as well as the storage of the same. Knowing this, and having voluntarily engaged in the business, and borrowed this money, and used it as well in the building of the elevator as in its other business, the defendant will not be permitted to plead that it had no authority under the law to do exactly what its articles of association stated to all the world was its object and purpose to do under and by virtue of its incorporation.

"The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong": *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 69; 20 Am. Rep. 504; 2 Morawetz on Private Corporations, sec. 693, p. 661; *Day v. Spiral Springs Buggy Co.*, 57 Mich. 151; 58 Am. Rep. 352; *Eureka Iron and Steel Works v. Brennan*, 60 Mich. 337. See also cases analogous to the present: *Board of Trustees v. Smith*, 58 Miss. 301; *Steam Navigation Co. v. Weed*, 17 Barb. 378; *Bradley v. Ballard*, 55 Ill. 413; 8 Am. Rep. 658; *Gold Mining Co. v. National Bank*, 96 U. S. 640; *McCarthy v. Lavasche*, 89 Ill. 270; 81 Am. Rep. 88.

The judgment is affirmed, with costs.

CORPORATIONS, WHEN ESTOPPED TO PLEAD ULTRA VIRES. — A plea of *ultra vires* is not permitted to prevail where it would not advance justice, but will accomplish a legal wrong: *Holmes etc. Mfg. Co. v. Holmes etc. Co.*, 127 N. Y. 262; 24 Am. St. Rep. 448, and note. Contract *ultra vires* cannot be enforced while it remains executory; but when it has been executed and the corporation has received the benefit thereof, it is estopped from denying the validity

of the contract: *Sherman etc. Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134, and note collecting other cases in the series; *Union Hardware Co. v. Plume etc. Mfg. Co.*, 58 Conn. 219; *Long v. Georgia etc. R'y Co.*, 91 Ala. 519; 24 Am. St. Rep. 931. In a recent case it was held that, in the absence of fraud, a corporation is liable for money borrowed from one of its stockholders for the payment of expenses, which were collateral, and but incidental to an act which may have been *ultra vires*, such expenses not being inseparably connected with the main act: *Taylor v. North Star etc. Mining Co.*, 79 Cal. 285.

RENARD v. CLINK.

[91 MICHIGAN, 1.]

MORTGAGES — TENDER AS DISCHARGE OF. — When an attempted foreclosure of a mortgage at law has proved ineffectual because an assignment of the mortgage was not of record at the time of such attempted foreclosure, a subsequent tender of the amount due upon the mortgage, exclusive of the costs of such foreclosure proceeding, is not sufficient to discharge the lien of the mortgage, and the mortgagee, after offering to apply the money tendered upon the mortgage debt, and having this offer refused, may maintain a bill in equity to foreclose the mortgage.

MORTGAGE. — A TENDER OF THE FULL AMOUNT due upon a mortgage discharges the mortgage lien, if the tender is refused without adequate excuse.

MISTAKE OF LAW — EQUITABLE RELIEF. — When parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect.

MISTAKE OF LAW — EQUITABLE RELIEF. — When a person is ignorant or mistaken with respect to his own antecedent and existing legal rights, interests, or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact.

Norton and Keat, for the appellant.

S. H. Clink, for the respondent.

MONTGOMERY, J. The bill in this cause was filed to foreclose a mortgage executed by the defendant Alice A. Clink to one A. H. Van Dusen, and by him assigned to complainant. The other defendants are subsequent purchasers with notice, after the mortgage became due. A foreclosure at law was attempted, a sale made, and a deed executed to complainant;

but owing to the fact that the assignment of the mortgage to complainant was not of record at the time of said attempted foreclosure, that proceeding proved ineffectual. After the complainant had obtained her deed on the foreclosure at law, and before the filing of the present bill, the defendant Clink tendered to complainant the amount due upon the mortgage, exclusive of the costs of such former foreclosure; and in this proceeding it is claimed that such tender operated to discharge the lien of the mortgage. The court below sustained this defense, and dismissed the bill. It is made clear by the testimony that the complainant, at the time she refused the tender, supposed that she had acquired title by her former foreclosure, and that, notwithstanding this, she was ready to accept the amount of the mortgage, interest, and costs. It also appears that she offered to take the money tendered so far as it would go, but that defendant refused to permit this, unless she would accept it in full payment and discharge of the mortgage. Under these circumstances, we think the court below erred in dismissing the bill.

Under the repeated rulings of this court, a tender of the full amount due upon the mortgage will operate to discharge the lien of the mortgage, if the tender be refused without adequate excuse: *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468; *Eslow v. Mitchell*, 26 Mich. 500; *Sager v. Tupper*, 35 Mich. 134; *Stewart v. Brown*, 48 Mich. 383. But in the present case it appears beyond question that the complainant had no purpose of exacting from the defendant any sum beyond what she believed to be her legal due. While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect: *Martin v. Hamlin*, 18 Mich. 354; 100 Am. Dec. 181; *Lapp v. Lapp*, 43 Mich. 287. But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or es-

tates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact: 2 Pomeroy's Eq. Jur., sec. 849, p. 314; *Reynell v. Sprye*, 8 Hare, 222; *Blakeman v. Blakeman*, 39 Conn. 320; *Whelen's Appeal*, 70 Pa. St. 410; *Hearst v. Pujol*, 44 Cal. 230; *Morgan v. Dod*, 3 Col. 551; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Lansdowne v. Lansdowne*, 2 Jacob & W. 205.

In *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553, the mortgagor filed his bill to set aside a mortgage sale, and asked that the premises be relieved from the mortgage lien. The court found that the mortgagee was mistaken as to his legal rights, but was acting in good faith, and refused to enforce the statutory penalty, and decreed that the mortgagor pay the mortgage debt as a condition to relief.

In *Canfield v. Conkling*, 41 Mich. 371, a bill was filed to set aside a mortgage, and to recover the penalty for refusal to discharge it on tender of the amount due. The court found that the tender was sufficient, and say: "He [defendant] was bound to accept the tender, and complainant had made out a sufficient case for relief. But the question was one on which he might be mistaken without any serious fault, and we do not think it one where the mortgage ought to be held canceled without payment; nor is it a case calling for the statutory penalty for a willful and knowing wrongful refusal to discharge the mortgage."

The decree below should be reversed, and a decree entered in this court providing for a sale of the mortgaged premises to satisfy the amount due and unpaid upon the mortgage.

The defendant will recover the costs of the court below, and the complainant will be entitled to the costs incurred in this court.

TENDER, REQUISITES OF. — COSTS: See, generally, note to *Moynahan v. Moore*, 77 Am. Dec. 470-472. To save costs, defendant must keep his tender good by actually producing the money and depositing it in court, and it is too late where the amount tendered before suit is not deposited in court until after the trial has begun, and after the accrual of costs not embraced in the amount tendered: *Warrington v. Pollard*, 24 Iowa, 281; 95 Am. Dec. 727. Compare *McIntyre v. Carver*, 2 Watts & S. 392, 37 Am. Dec. 519, *Murray v. Winlley*, 7 Ired. 201, 47 Am. Dec. 324, *Berry v. Davis*, 77 Tex. 191, 19 Am. St. Rep. 748, *Collier v. White*, 67 Miss. 133, *Elder v. Elder*, 48 Kan. 514, as to the liability of defendant for costs, when his tender has been made after the beginning of the suit. On the other hand, a tender in payment of a debt prevents the recovery of costs in an action afterwards brought to enforce the demand: *Stowell v. Read*, 16 N. H. 20; 41 Am. Dec. 714; *Castle v. Castle*, 78 Mich. 298. The plaintiff, in proceeding, after a tender and deposit, runs

the risk of paying defendant's costs, if the recovery does not exceed the amount tendered: *Taylor v. Brooklyn etc. R'y Co.*, 119 N. Y. 561; and in such case is liable for all the costs accruing subsequent to defendant's offer: *Williford v. Gadsden*, 27 S. C. 87. The benefit of the tender is lost, unless it is kept good: *Saum v. La Shell*, 45 Kan. 205.

TENDER OF MORTGAGE DEBT, EFFECT OF: See *Kortright v. Oady*, 21 N. Y. 343; 78 Am. Dec. 145, and the extended note thereto. See also, for additional authorities, the notes to *Perre v. Castro*, 76 Am. Dec. 449; *Cranston v. Crane*, 93 Am. Dec. 106; *Moore v. Norman*, 19 Am. St. Rep. 252; *Werner v. Tuck*, 24 Am. St. Rep. 447. When the whole amount secured by a mortgage on real estate is due, a tender of the same by the owner of the mortgaged premises extinguishes the lien of the mortgage, though the tender is not kept good; but it does not discharge the promise or covenant to pay the debt, and for this the debtor remains liable: *Nelson v. Loder*, 132 N. Y. 288. A mortgagee cannot refuse a tender of an overdue mortgage debt on the ground that the amount offered does not include another distinct debt. But if the mortgagor afterwards fails to make his tender good on the offer of the mortgagee to accept it, and does not bring the amount into court, the tender thus made will not prevent a judgment for the full debt: *Salinas v. Ellis*, 26 S. C. 337. A tender, by the mortgagor, before the sale, of the amount due and in arrear under the mortgage, together with the expenses incurred by the mortgagee in and about the advertisement of the property, is not sufficient to prevent foreclosure, when other covenants have been broken by the mortgagor: *Roberts v. Loyola B. Ass'n*, 74 Md. 2. If, after the refusal of a tender, the debtor wishes to extinguish his liability for subsequently accruing interest, or to demand some affirmative relief, he cannot retain the money, subject to his own use, but must devote it to the specific purpose of paying the debt, and put it within the power of the creditor to receive it at any time, and so must keep the tender good: *Nelson v. Loder*, 132 N. Y. 288. A tender made on condition of entry of satisfaction does not vitiate a tender, since such a condition is a legal right: *Salinas v. Ellis*, 26 S. C. 337.

MISTAKE OF LAW, WHEN RELIEVED AGAINST: See note to *Berry v. American Central Ins. Co.*, 28 Am. St. Rep. 554, where other cases and notes in the series are cited. The four principal exceptions to the rule that no relief can be obtained against a mistake of law, are: 1. Where there is a marked disparity in the position and intelligence of the two parties, with the result that on the one side undue influence is exercised, while on the other, undue confidence is reposed: *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556. 2. Where one, through mistake as to his legal rights, acknowledges himself under an obligation which the law will not impose: *Warden v. Tucker*, 7 Mass. 449; 5 Am. Dec. 62. Compare *Gerdine v. Menage*, 41 Minn. 417. 3. Where it is perfectly evident that the only consideration of a contract was a mistake as to the legal rights and obligations of the parties: *Underwood v. Brockman*, 4 Dana, 309; 29 Am. Dec. 407. In such a case, if both parties are mistaken, the ground of relief is want of consideration: *Underwood v. Brockman*, 4 Dana, 309; 29 Am. Dec. 407; while if one party is mistaken as to the law, and the other, with knowledge, contracts with him, the ground of relief is fraud: *State v. Papp*, 13 Ark. 129; 56 Am. Dec. 303. 4. Where there is a mistake of law on both sides, owing to which the object of the parties cannot be attained: *Champlin v. Layton*, 18 Wend. 407; 31 Am. Dec. 382; *Corrigan v. Tierney*, 100 Mo. 277. See also extended note to *Black v. Ward*, 15 Am. Rep. 171-184.

HALLOCK v. KINNEY.

[91 MICHIGAN, '57.]

SEDUCTION BY PERSUASION. — Seduction may be accomplished by means of influence and persuasion, intended to reach, and actually reaching, that result, without a promise of marriage or pecuniary advantage. Such effectual persuasion actively causing the seduction may be as distinct a grievance as more venal representations, which appeal to covetousness more than to excited feelings.

SEDUCTION BY PERSUASION — EVIDENCE ESTABLISHING. — In an action for seduction, evidence that the defendant took the plaintiff, a girl sixteen years old, living with her parents, and hitherto chaste, to a dance some distance from her home, that upon their arrival he procured a bedroom for the express purpose of debauching her, and immediately commenced his indecent proposals, and that late at night they left the ball-room and went to the bedroom at his solicitation, where he accomplished his purpose, makes out such a case as should be submitted to the jury under proper instructions.

Ellsworth and Rarden, and W. D. Fuller, for the appellant.

George Luton and Michael Brown, for the respondent.

GRANT, J. This is an action on the case for seduction.

Plaintiff, at the time, was about sixteen years of age, living with her parents in the country, and had hitherto been chaste. Defendant invited her to attend a dance with him in a village six miles from her home. They had known each other for about a year, and she testified that she thought a great deal of him. They left her home about four o'clock in the afternoon, and on arriving at the hotel he obtained a bedroom, to which he took her. It is evident from her testimony that he took her there for the express purpose of debauching her. As soon as she had taken off her wraps in the room, he immediately commenced his indecent proposals. Late in the night he proposed to her to go from the ball-room to the bedroom, and after a while she yielded to his solicitations.

It is unnecessary to state the evidence in detail. The court was in error in directing a verdict for the defendant. The case should have been submitted to the jury under the proper instructions, and especially in view of plaintiff's tender age.

The language of this court in *Stoudt v. Shepherd*, 73 Mich. 596, is applicable to the facts in this case: "This court recognize what we conceive to be the recognized doctrine of experience, that seduction may be accomplished by means of influence and persuasion intended to reach, and actually reaching, the result, which do not necessarily involve either a

promise of marriage or pecuniary advantage; and that such effectual persuasion, which is the active cause of it, may be as distinct a grievance as the more venal representations, which appeal to covetousness more than to excited feeling."

The judgment reversed, and a new trial ordered.

SEDUCTION: See, generally, notes to *State v. Carron*, 87 Am. Dec. 405-411, and *People v. De Fore*, 8 Am. St. Rep. 870-872. To sustain the action, it is not necessary to show that the defendant used deception, flattery, or false promises to accomplish his purpose; it is sufficient if the seduction resulted from the solicitation, importunity, or from any means or arts used by the defendant: *Reed v. Williams*, 5 Sneed, 580; 73 Am. Dec. 157. The word "seduction" means the use of some influence, promise, arts, or means on the part of a man, by which he induces a woman to surrender her chastity and virtue: *Patterson v. Hayden*, 17 Or. 238; 11 Am. St. Rep. 822. Compare *Pulnam v. State*, 29 Tex. App. 454; 25 Am. St. Rep. 738. For a case in which the circumstances were held to amount to the employment of "artifice," see *Hawn v. Banghart*, 76 Iowa, 683; 14 Am. Rep. 261.

HUTCHINSON MANUFACTURING COMPANY v. PINCH.

[91 MICHIGAN, 153.]

DAMAGES — PROSPECTIVE PROFITS. — In an action to recover for the breach of a contract for furnishing machinery and repairing a custom and manufacturing flouring-mill, the measure of damages is the fair rental value of the mill during the time the owner is deprived of its use after the expiration of the time for the performance of the contract; but prospective profits of such mill are too speculative to be considered as damages.

DAMAGES FOR BREACH OF CONTRACT TO REPAIR MILL. — In an action to recover for the breach of a contract to furnish machinery and repair a flouring-mill, the owner cannot recover for grain ground and poor flour manufactured to test the mill during the time when he knew that it was not in condition to do good work; but he may recover for his time lost and the amount paid his employees while lying idle by reason of the breach of the contract.

Shriner and Fox, for the appellant.

Daniel A. Ferguson, and *Wilson and Cobb*, for the respondent.

MORSE, C. J. The plaintiff sued defendant for machinery and repairs furnished for the latter's flouring-mill. The defendant claimed that under the agreement the plaintiff promised to put in the machinery and complete the repairs in a good and workman-like manner within ten days after the work was commenced, which work should begin "in a few days

or a short time" after the date of the agreement; that plaintiff did not commence the work as soon as agreed, did not do it in a workman-like manner, and did not complete it within four weeks after the work was begun; that by reason of improper material, and the unskillful manner in which the work was done, much of the flour made by such mill was unfit for "custom and merchant flour"; that said mill was kept closed fifty days, and that the mill, as completed by plaintiff, is in an improper condition for running and properly performing the work of a first-class full roller-process custom and merchant flouring-mill, as plaintiff agreed it should, and that it takes more power to operate it.

On the trial the defendant was asked:—

"Q. Mr. Pinch, how much were you damaged by reason of the mill lying idle for the excess of ten days, until the time it was finished? In other words, it laid still how many days more than the ten days?

"*Mr. Ferguson.*—I object.

"*The Court.*—That brings up the question. The witness, I think, can't state how many dollars and cents he has been damaged. He can state how he was damaged, and show the circumstances that will enable the jury to judge. There is another question involved in it, and perhaps it had better be discussed together. I suppose you are getting at the profits of the mill?

"*Mr. Shriner.*—Yes, sir."

Mr. Corbin, for plaintiff, contended that the profits were too indefinite, and the question was excluded.

Counsel for defendant then offered as follows:—

"*Mr. Shriner.*—Now, if the court please, we offer to show that after Mr. Crandall and his men worked on the mill ten days, Mr. Pinch notified Mr. Hutchinson that the time had expired in which he was to have the mill completed; that the mill was overstocked with grain; that he was losing, by reason of the delay, every day; and that these men went on with that mill until the third day of March; and that, by reason of that failure to fulfill their contract, Mr. Pinch suffered large damages, to the amount of five hundred dollars.

"*The Court.*—This offer may be considered as preceding the former ruling.

"Q. About how many grists were in your mill at the time they had worked ten days upon their contract, on the repairing of the mill?"

“Q. What was the difference, Mr. Pinch, of the value of flour per barrel after the mill was finally completed in perfect order, than what it was before they commenced fixing the mill?”

Both these questions were objected to and ruled out. He was also asked: **“What, in your opinion, was the use of the mill worth for those eleven days?”**

The court said this was an indirect way of asking witness how much he could have made out of the mill, and excluded the question. Other questions were asked in different ways, but all to the same import, and were not allowed to be answered. It was also attempted to show the value of defendant's time lost during the time over ten days in which the mill could not be run, but the circuit judge was of the opinion that he could not recover for such lost time. Counsel for defendant then made the following offer: —

“I offer to show by Pinch that his business was injured a large amount by reason of the manner in which the contract was performed, and that he lost the use of the mill, and the profits of the mill, for a long time, to wit, thirty days, by reason of the manner in which the contract was performed. I desire to show what the profits were, and to show in every way that he was injured. I desire to show by him how he was injured.

“The Court. — How do you propose to show that he was injured?

“Counsel for Defendant. — By the loss of his time; by the injury of the flour; by the amount he had to pay out in the place of it; by the loss of time; by the loss of customers; and by the loss of the reputation of the mill, because of its having been pronounced finished by those parties, when it was improperly finished.

“Counsel for Plaintiff. — It is objected to as immaterial and irrelevant. Not a proper way to prove the measure of damages. (Which objection was by the court then and there sustained.)”

The court instructed the jury that no damages could be awarded to the defendant for the profits lost by reason of the mill being idle, even if they found that the agreement was that the mill should be put in good running order in ten days.

This was a custom as well as a manufacturing flouring-mill. The prospective profits of such a mill would certainly be too speculative to be shown as damages: *Howard v. Still-*

well etc. Mfg. Co., 139 U. S. 199; *Pennypacker v. Jones*, 106 Pa. St. 237; *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Rogers v. Bemus*, 69 Pa. St. 432; *Winne v. Kelley*, 34 Iowa, 339; *Allis v. McLean*, 48 Mich. 428; *McKinnon v. McEwan*, 48 Mich. 106; 42 Am. Rep. 458; *Maltby v. Plummer*, 71 Mich. 579; *Petris v. Lane*, 58 Mich. 527. The defendant relies upon *Leonard v. Beaudry*, 68 Mich. 312, 80 Mich. 163, in support of his contention that he was entitled to show the profits that he might have made in the mill if it had been finished within ten days. But in *Leonard v. Beaudry*, 68 Mich. 312, 80 Mich. 163, and in *Atkinson v. Morse*, 63 Mich. 276, there was a breach of contract, where the difference between the cost of doing the work to be performed and the contract price would be the measure of damages. The profits in such a case we held could be ascertained with reasonable certainty. This case seems to fall within the other line of cases, where the uncertain and speculative profits of a mill from day to day are endeavored to be measured; where there is no certain amount of work contracted to be done at a certain or fixed price for the work, but where the mill-owner must depend upon how much custom he may happen to have, and many other contingencies, as pointed out in the cases above cited.

But upon examination of the authorities, and upon principle, I am satisfied that the defendant was entitled to show, in reduction of plaintiff's claim, the value of the use of the mill while it was compelled to lie idle by the failure of plaintiff to complete the contract within the time specified. A denial of this right would be rank injustice, and leave the defendant remediless for his loss, and at the same time compel him to pay the full value of the machinery and repairs to the plaintiff, the same as if the work had been done within the time agreed upon.

"As a general rule, the expected profits of a business cannot be proved, and therefore cannot be recovered. They might have been made, and they might not. Hence, in such cases, the measure of damages is not the expected profits, but the average value of the use of the land, property, or business, and to ascertain this, evidence of actual past profits must be admissible": 1 Sedgwick on Damages, 8th ed., sec. 174. "Rent is given, not as specific damage, but as a fair average measure of compensation": 1 Sedgwick on Damages, 8th ed., sec. 186; *Sinker v. Kidder*, 123 Ind. 528; *Crawford v. Parsons*, 63 N. H. 438; *Woodin v. Wentworth*, 57 Mich. 278; *Bostwick v.*

Losey, 67 Mich. 554; *Griffin v. Colver*, 16 N. Y. 489, 496; 69 Am. Dec. 718.

In the present case, the failure to put in the machinery and make the repairs within the ten days naturally resulted in the stopping of the mill while the machinery was being put in. The defendant expected to shut down his mill for ten days, but under his statement of the agreement, the work was to be finished within that time. If so, he was compelled to keep his mill idle for some time beyond the ten days, because of the fault of the plaintiff in not fulfilling its contract as to the time of performance. His damage is the value of the use of the mill while it was so kept idle by the plaintiff's fault. This is not an allowance of the profits which, in this particular case, might have been made, but of the average sum, represented by rent, which the property was worth: 1 Sedgwick on Damages, 8th ed., sec. 190; 2 Sutherland on Damages, 490.

When a contractor undertakes to perform a contract to put a mill or other machinery in operation, he ought to be holden to indemnify the other party against the loss of the use of the mill or machinery after the expiration of the time for the performance of the contract: See *Davis v. Talcott*, 14 Barb. 611, 628; *Brown v. Foster*, 51 Pa. St. 165; *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Green v. Mann*, 11 Ill. 613; *Rogers v. Bemus*, 69 Pa. St. 432; *Willey v. Fredericks*, 10 Gray, 357; *Benton v. Fay*, 64 Ill. 417; *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718.

In *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635, a new mill was erected, but not in the time agreed upon. The uncertainties of the milling business were considered too great to allow prospective profits as damages, but the measure of damages was held to be the fair rental value of the mill.

In *Green v. Mann*, 11 Ill. 613, the lessor of the mill agreed to put in two additional run of stone, but failed to do so. The measure of damages was held not to be the expected profits from the use of the stone in the business, but the fair value of the use of the two run of stone.

In *Rogers v. Bemus*, 69 Pa. St. 432, the profits of a new mill, not erected within the time agreed upon, were held to be too remote, contingent, and speculative; but it was said that the fair rental value of the mill was the true measure of the damages.

In a late case in Iowa (*Brownell v. Chapman*, Feb. 2, 1892; 51 N. W. Rep. 249), this matter was carefully considered.

The plaintiff sued to recover the price of boilers furnished for a pleasure-boat at a summer resort to the proprietor of the resort. The defendant put in a counterclaim for damages caused by the failure of plaintiff to deliver the boilers within the time agreed upon. It was held that the measure of defendant's damages was the rental value of the boat, and not the interest on the capital invested therein for the time defendant was deprived of its use. The court refer to the cases of *Allis v. McLean*, 48 Mich. 428, and *Taylor v. Maguire*, 12 Mo. 813, as not in harmony with this holding, but say that they are clearly overborne by the weight of other cases and the current of authority. Mr. Sedgwick also says that the case of *Allis v. McLean*, 48 Mich. 428, "would hardly be followed": 1 Sedgwick on Damages, 8th ed., sec. 186. In *Allis v. McLean*, 48 Mich. 428, after discussing the question of prospective profits, and ruling that they could not be shown as damages, Judge Cooley says: "But this case is thought to be different, because here the fair rental value of the mill is proved, and it is said that this was certainly lost. But we do not know that that was the case. If the mill had been in condition to rent at that time, there may have been no customer for it on terms the owner would have consented to grant; and if customers were abundant and satisfactory, it cannot be assumed that the whole rental value is lost when a mill stands idle. The wear and tear of machinery and buildings in use is something, and it is not improbable that the landlord would take this, among other things, into account in determining what should be the rent. But in this case it does not appear that rent was lost, or could have been lost; for it is not shown that defendants desired to rent, or would have consented to do so if a customer had offered. In fact, the contrary is clearly inferable."

The exact point thus ruled in *Allis v. McLean*, 48 Mich. 428, has never since been before this court; yet in two cases (*Woodin v. Wentworth*, 57 Mich. 278, and *Bostwick v. Losey*, 67 Mich. 554) the value of the use of a mill has been permitted to be shown as the measure of damages. In the first case the injury complained of was the unlawful holding back and diverting of the waters of a river, thereby preventing plaintiff from using his mill. It may be claimed that, as this was an action in tort, there is no analogy between this case and *Allis v. McLean*, 48 Mich. 428. But in *Bostwick v. Losey*, 67 Mich. 554, the action was in *assumpsit*. Plaintiff sued for the rent of a saw-mill. Defendants pleaded that plaintiff had

agreed to make certain repairs, but failed to keep such agreement, to their damage, and sought to recoup such damages against plaintiff's claim. This court said in that case: "The failure of the water-power was the grievance complained of. The defendants were entitled to the use of it, as it would have been had the flumes been kept in repair, for saw-mill purposes. The value of the use of such water-power for such purposes was shown by witnesses. We do not consider that such value was speculative or uncertain, or that showing such value, and allowing it as the basis of damages, was in effect permitting the profits of the saw-mill to be computed in estimating the damages. The contract or lease itself shows that this water-power had a rental value, and we can see no serious difficulty in the way of ascertaining to a tolerable and sufficient certainty the value of this use, to which the defendants were entitled by their agreement."

The rule announced in *Bestwick v. Losey*, 67 Mich. 554, in principle applies to the case before us, and I see no reason why the value of the use of this flouring-mill cannot be ascertained in this case without serious difficulty and with sufficient certainty.

It being firmly established by the authorities that the prospective profits of a milling business are too speculative and uncertain to be used as a measure of damages, there would be no adequate remedy for the owner of a mill, in such a case as this, for a breach of contract that for a certain time would deprive him of the use of his property, if the case of *Allis v. McLean*, 48 Mich. 428, is to be taken as authority in this state. This would be so manifestly unjust that, in so far as that case seems to hold that the fair rental value of a mill cannot be shown as damage in a case like the present, I think it should be distinctly overruled. It is not only against the whole current of authority elsewhere, but it is opposed to equity and justice. In the case before us, the nature of the contract was such that both of the parties must have understood that the mill must be idle while the changes were being made in the machinery of it. If the plaintiff agreed to do the work in ten days, and failed to do so, there can be no hardship in requiring it to make good the loss of the use of the mill which was occasioned by its failure to perform its contract.

The defendant would also have been entitled to the value of the loss of his own time, had such damages been properly pleaded. And if he had shown that he was obliged to pay

men in his employ while they were lying idle, on account of plaintiff's fault, he would have been entitled to recompense for the money so expended: *Brownell v. Chapman*, Iowa, Feb. 2, 1892; 51 N. W. Rep. 249.

The work was commenced on the 7th of February. Defendant claimed that Mr. Crandall, who was doing the work for plaintiff, declared the mill completed on the third day of March. Defendant, however, told Crandall that he did not want the mill left on his hands until it was thoroughly tested, and if he could not stay and take charge of it, he wanted the plaintiff to send some one to take charge of it. A man by the name of Hoffman came, as he supposed by plaintiff's order, and ran the mill five days, but it did such poor work that defendant discharged him, because he thought him incompetent, and the mill was wasting the stock. He then telegraphed plaintiff that everything was wrong, the mill was losing defendant money, running good stock into bad, and plaintiff had better come and see to it. Plaintiff sent Mr. Sewell, who came there and went to work, and finished the mill March 25th. Defendant, by some of the questions above quoted, and by other inquiries, attempted to show the loss to him by reason of the poor flour manufactured while Hoffman was running the mill, and before Sewell commenced work,—in all, about eleven days. The court would not permit him to do so, because defendant in his own evidence claimed that the mill was not finished until Sewell left it, and that the flour was ground in experimenting; that he could not charge his loss to plaintiff. Defendant also attempted to recover for the value of grain lost,—as his counsel stated, “understood to be lost, purely experimenting.” This was not permitted. In view of the fact that the defendant, by his own showing, knew that the mill was not in good condition to do good work, and ground this flour simply to test it, we do not think the court erred in these rulings.

The plaintiff denied that it agreed to perform the work in any given time, but we have dealt with the question of damages in the light of the defendant's theory.

The judgment of the court below is reversed, with costs of this court to the defendant, and a new trial granted.

DAMAGES FOR BREACH OF CONTRACT, PROFITS AS AN ELEMENT OF. — Merely speculative or remote damages by reason of a breach of contract are not recoverable: *Van Winkle v. Wilkins*, 81 Ga. 93; 12 Am. St. Rep. 299, and notes;

Stanton v. New York etc. R. R. Co., 59 Conn. 272; 21 Am. St. Rep. 110, and note. See, further, notes to *Western U. Tel. Co. v. Hyer*, 1 Am. St. Rep. 229; *Cates v. Sparkman*, 15 Am. St. Rep. 812; *Wright v. Mulvaney*, 23 Am. St. Rep. 398; *Trigg v. Clay*, 29 Am. St. Rep. 729. If an established business is injured or destroyed, its owner can recover damages sustained thereby, and in an action for their recovery, evidence of the profits he was actually making is admissible: *Hawthorne v. Singel*, 88 Cal. 159; 22 Am. St. Rep. 291. So where the business of a manufacturer has been wrongfully stopped by defendant, and at the time of such stoppage the plaintiff had contracts which would have yielded a profit, this profit is the proper measure of damages; but the estimated profits of the general business are too speculative and remote: *Jones v. Oall*, 96 N. C. 337; 60 Am. Rep. 416; *Houston etc. R'y Co. v. Hill*, 63 Tex. 381; 51 Am. Rep. 642. So where plaintiff is employed as a traveling salesman, the profits which he might have earned under the contract are too speculative to be recovered: *Brigham v. Carlisle*, 78 Ala. 243; 56 Am. Rep. 28. So damages for loss of profits and delays in voyages, by reason of defects in the construction of a steamboat, cannot be set off in an action for the price, such damages being too remote: *Blanchard v. Ely*, 21 Wend. 342; 34 Am. Dec. 250. See, further, notes to *Sitton v. Macdonald*, 60 Am. Rep. 488-496; *Griffin v. Colver*, 69 Am. Dec. 724-727; *McKinnon v. McEwan*, 42 Am. Rep. 461-465.

BAKER v. FLINT AND PERE MARQUETTE R. R. Co.

[91 MICHIGAN, 298.]

JUDGMENT — RECOVERY BY MINOR AS BAR TO PARENT'S ACTION. — When an action by a minor son for negligent injuries is prosecuted by his father as his next friend, a recovery for the value of the services of the son during his minority, insisted upon by the father as an element of damages, is a bar to a subsequent action to recover for the loss of such services, brought by the father in his own name; but such recovery will not bar the right of the father to recover the amount expended for the son in nursing, medicine, and medical attendance, in the absence of contributory negligence on the part of the son or his parents.

• *William L. Webber*, for the appellant.

Simonson, Gillett, and Courtright, for the respondent.

LONG, J. This is a suit to recover damages sustained by plaintiff, arising out of the same accident that resulted in his son, Oscar, losing his leg by being run over by defendant's train of cars on November 5, 1886, at Eleventh Street depot, in Bay City, which case is reported in 68 Mich. 90. The facts are so fully stated in that case that it becomes unnecessary to restate them here.

The claim of damages in the present case is for the loss of Oscar's services during minority, and for money expended for nursing, medicine, and professional treatment for him.

There are but two questions raised upon this record which we need discuss. They relate to the ruling of the trial court, and its charge to the jury, upon the questions: 1. Whether the plaintiff is estopped from recovery for loss of his son's services during minority by reason of a claimed recovery for the same services in Oscar's suit, where the plaintiff appeared as his next friend; 2. As to the plaintiff's contributory negligence as affecting his right of recovery.

As touching the first question, it appears that the defendant, under its plea of the general issue, gave notice that the said Oscar Baker, mentioned in plaintiff's declaration heretofore, brought suit in said court, claiming damages for the same cause of action set forth in the declaration in this cause; that said suit was duly tried by said court and a jury, and judgment was rendered therein in favor of the plaintiff; that judgment and costs of said suit have been paid by the defendant herein to the said James H. Baker, as next friend of his said son, Oscar Baker; and that said James H. Baker has signed a receipt therefor in full satisfaction of said judgment and costs.

After the jury had been impaneled in the present case, and plaintiff had offered testimony to support his action, defendant's counsel objected to any proof being received under the declaration, for the reason that in said court, prior to the commencement of this suit, the same plaintiff, James H. Baker, had commenced a suit for the injury of his son, Oscar, in which suit he recovered verdict and judgment, which suit was taken to the supreme court, and there affirmed, and that judgment had been satisfied by the defendant; that in that suit plaintiff had recovered damages for the boy, or for himself as next friend of the boy, for his crippled condition, and his loss of ability to labor, and therefore plaintiff is estopped from maintaining this suit. The court overruled the objection, and rejected the proof offered in support thereof, to which the defendant excepted. The case then proceeded to trial, and at the close of the testimony, the counsel for defendant, in his second request, asked the court to charge the jury as follows: "The plaintiff in this case cannot recover, because he has failed to make out a case, in that, — a. He previously brought a suit in this court as next friend of his son, Oscar Baker, and recovered, and in his declaration in that suit he complained of the same injury sued on here, and did not limit the claim for damages to those accruing only to said Oscar

Baker. b. Because the uncontradicted evidence in this case shows that Oscar Baker was guilty of contributory negligence.
c. Because the uncontradicted evidence in this case shows that plaintiff and his wife, parents of said Oscar Baker, were guilty of contributory negligence."

This request was refused, and the court charged the jury as follows: "Then comes the loss of the boy's services for the fourteen years that would elapse between the time of this accident and the time he would arrive at the age of twenty-one years. On the amount of this you have no direct evidence, but you have the evidence derived from an inspection of the boy himself, and the father, and the whole family. . . . One question to be gotten at in the matter of damages is: How much the worse off in dollars and cents will this plaintiff, James H. Baker, be by reason of the boy having been crippled in the way he is, counting in the loss of his services and the expenses of taking care of him while he was sick and in the curing of his wound, and the expense of the nurse?"

The court further directed the jury that as none of the items involved in this suit could be legally proved or recovered for in the suit brought by Oscar, therefore the plaintiff would not be barred from recovering such damages in this action.

We have looked into the former record, — the suit of Oscar against the defendant company, — and find that the declaration in that case contains two counts. The allegation as to damages in the first count is, after stating the injury and the disorders arising therefrom: "He so remained for a long space of time, to wit, from thence hitherto, during all of which time he, the plaintiff, suffered great pain, and was hindered and prevented from doing any work and from attending school, and is still so prevented, all to the damage of said plaintiff," etc.

In the second count it is stated that "he so remained for a long space of time, to wit, from thence hitherto, during all of which time he, the plaintiff, suffered great pain, and was and is hindered and prevented from doing any work, and from attending school, and is, and always will be, hindered and disabled from earning his own living; wherefore the plaintiff says that he is injured and has sustained damage," etc.

Evidence was introduced under that declaration by the plaintiff to sustain his cause of action, and the court charged the jury as follows: "If you conclude that the plaintiff is en-

titled to recover, consider, then, the extent or the amount of damage that he has suffered. . . . Now, in determining that question, the jury are to take into consideration the pain and suffering that the plaintiff has endured; . . . also the nature of the injury, and how it will affect him in his future life, so far as his ability to earn money is concerned."

It will be seen from this that the jury must have taken into consideration, in fixing the amount of damages which Oscar was entitled to recover, his inability to labor from the time the injury occurred during the remainder of his life. The five thousand dollars which Oscar recovered in his suit included, therefore, the damages which are sought to be recovered by the plaintiff in this suit.

It is contended upon the part of plaintiff's counsel in this court, that though Oscar did recover for the value of such services in his suit, yet the plaintiff in the present suit would not be barred from recovery, or estopped from making claim therefor, for the reason that, as matter of law, Oscar had no right to recover for such damages in his suit. In support of this proposition counsel cite *Wilton v. Middlesex R. R. Co.*, 125 Mass. 130; *Texas etc. R'y Co. v. Morin*, 66 Tex. 225; *Central R. R. Co. v. Brinson*, 64 Ga. 475; *Durkee v. Central Pac. R. R. Co.*, 56 Cal. 388; 38 Am. Rep. 59.

As we have before stated, the sole ground upon which the plaintiff's counsel now contend for the right to recover damages in behalf of the father, which have once been recovered in behalf of the child by his next friend, is, that the child had no legal right to recover for such damages in the action brought by him.

In the case of *Texas etc. R'y Co. v. Morin*, 66 Tex. 225, the action was brought by the minor, by his father as next friend, against the company for personal injuries. The trial court charged the jury that in estimating damages they had a right to take into consideration his capacity to earn money. This was held error, for the reason that the services of the infant belonged to the parent during his minority, and not to the infant, unless it was shown that the child had been emancipated by the parent; and the court cited, in support of this, *Houston etc. R. R. Co. v. Miller*, 51 Tex. 275, and *Sawyer v. Sauer*, 10 Kan. 519. The question of the right of the father to recover such damages, though the same had been recovered by the infant in another action, was not involved in the case.

In *Durkee v. Central Pac. R. R. Co.*, 56 Cal. 388, 38 Am. Rep.

59, the action was by the father to recover damages for negligent injury to his infant son, and it was said by the court that "whatever was merely personal to him [the infant] should not enter into the father's damages, because for them the son would have a right of action"; and that court state the rule laid down by Shearman and Redfield in their work on negligence, section 608, as follows: "The damages recoverable by a parent, guardian, or master for a negligent injury to the person of his child or servant are strictly limited to an amount fully compensatory for the consequent loss of services for a period not exceeding the minority of the child, or the term of service of a servant, and the expenses which the plaintiff has incurred in consequence of the injury, such as for surgical attendance, nursing, and the like. . . . Damages awarded upon any other grounds than these clearly belong to the person corporally injured, whose right to sue, it must be remembered, is entirely unaffected by the action of his parent or master. If the latter should be allowed to recover for the pain and suffering of the servant (or child), it would follow, either that the servant (or child) could not recover himself for the same cause, or that the negligent person would be liable to pay twice the amount of damage which he had really done. Either alternative is contrary to justice and common sense."

The case, therefore, did not involve the question involved in the present suit, and no such rule was contended for there as here.

In *Central R. R. Co. v. Brinson*, 64 Ga. 475, the action was by the father, as next friend of his son, to recover damages for negligent injuries. To this suit was filed the plea of the general issue and a special plea in bar, which was, that the father of the plaintiff had brought his individual suit for the same cause of action and for the same injury, which was then pending and undetermined in the same court. On motion, this plea was stricken out, and the cause proceeded to trial under the general issue, and plaintiff had judgment. It was held that the striking out of this plea was not error, for the reason that a minor, being damaged in his person, may bring suit to recover for any permanent injury which he has sustained reaching beyond his majority, while the father may sue for any trespass done or damage sustained whereby he loses the services of the child, as also for any expense incurred in and about the healing and restoring of said child's health. It will be noticed that the question involved in that case is

not the same as that involved in the present case; the court holding that it would not bar the infant's right of recovery simply because the father had brought his action in the same court, and had set up in his complaint or declaration a claim for damages of like character as those claimed by the infant in his suit, the court laying down the proper rule of damages under which each might recover.

In *Wilton v. Middlesex R. R. Co.*, 125 Mass. 130, the action was by the father for the loss of the services of Ellen Wilton, his daughter, occasioned by her being run over by one of defendant's cars. At the trial it appeared that Ellen, in the name of her father as next friend, had brought an action and recovered five thousand dollars for the injuries done her by this accident. This case is reported in 107 Mass. 108. The trial court was asked to rule upon this, that the former action having been brought by the plaintiff, and money having been paid to him as next friend, he could not bring an action for any loss of services, because he had already been paid therefor. The trial judge refused so to rule, and held the plaintiff entitled to recover the reasonable value of Ellen's net earnings to her father over and above what, but for the accident, her support would have cost, and gave judgment for the plaintiff. The court said in that case: "The previous suit is not a bar to the present. The money which the plaintiff received in the former action is not his money, nor can he appropriate it to the payment of labor which the child was bound to perform. The measure of damages in the former action was the injury to the child, and not the injury to the father. It is analogous to the cases, formerly quite frequent, in which, for injuries to a wife, the husband and wife must join for personal injuries to the wife, but for the expenses incident thereto, the husband must bring his sole action in his own name."

It does not appear in that case that in the action which the father brought as next friend for his daughter any claim was made or recovery had for damages for loss of service of the child, or expenses incurred in and about the restoration of the child to health; and the court say that the measure of damages in the former action was the injury to the child, and not the injury to the father. The court very properly held, therefore, that the money which the plaintiff received could not be appropriated to the payment of labor which the child was bound to perform. If the case had been presented to that court which is presented in the present case, — as to

whether the father, as next friend, having recovered for the loss of services of the child, could again recover in an action brought by himself for the value of the loss of the same services, — there can be no doubt that that court would have said that it would be contrary to justice and common sense to allow the plaintiff, first as next friend, and second in his own personal interest, to recover damages for the value of the loss of the services of his infant daughter.

It appears that the plaintiff in this case, as next friend of his son, Oscar, took part in the trial of the former case, and insisted upon a recovery by his son for the very damages — that is, the value of the loss of Oscar's services — which he now seeks to recover in the present case. It is undoubtedly true that, as matter of law, Oscar had no right in his suit to recover such damages without the consent of his father; but he did recover with the consent of his father; therefore the father is now estopped from setting up claim for the same damages in this action in his own name. It is true that the earnings of a minor son belong to the father, unless the father has given him his time and earnings; but the father cannot recover for such earnings when he has emancipated him: *Schoenberg v. Voigt*, 86 Mich. 310; *Allen v. Allen*, 60 Mich. 635; *Bell v. Bumpus*, 63 Mich. 375. If the case here had been for the earnings of the minor son, and it appeared that in a former action by the son — the father acting as his next friend — he had recovered the value of his wages with the consent of the father, that fact would be held tantamount to manumission of the infant, so far as that suit was concerned, and the father would be estopped from recovery of the same wages. There can be no distinction between such a case and the present; and the fact that the father appeared and prosecuted as next friend was tantamount to a relinquishment of such loss of services. The court should have admitted the evidence, and have directed the jury that no recovery could be had by the father for the loss of such services, as their value had already been recovered by the son with the father's consent.

The amount expended by the father in nursing, medicine, and medical attendance does not seem to have been litigated in the former action, and it therefore becomes necessary to discuss one other question raised.

It is contended that the parents of the child were guilty of contributory negligence in permitting the boy to make a play-

ground of the railroad tracks and yards there, and for that reason the plaintiff could not recover. Upon that branch of the case, the court charged the jury that "before the plaintiff can recover, he must prove not only that the defendant was negligent, but that the negligence of the defendant was the cause of the injury. This means that he must prove that there was no negligence on the part of the plaintiff himself or of the boy which caused, or helped or contributed to cause, the injury. . . . The boy cannot carelessly run into danger, and then complain, or lay the foundation for his father to complain, if he gets hurt. . . . But children are only required to exercise so much care and discretion as ought reasonably to be expected of their age and mental capacity when placed in that situation. If this boy did all that could reasonably be expected of such a boy as you find him to have been at that time, he did all that the law requires, and was not guilty of such contributory negligence as will prevent the father from recovering damages in this case. If he did not do so, then his father can have no verdict."

Again, the court directed the jury: "If the plaintiff himself was negligent, and his negligence contributed to bring about the injury, he cannot recover. If he was negligent in allowing the boy—such a boy as this was—to be playing there, or in not preventing him from being there, or omitted any precaution that he ought to have taken under the circumstances, he cannot recover."

Some testimony was given upon the part of the defendant that the boy, Oscar, was frequently about the freight-cars in front of the depot, and was in the habit of catching on and jumping off from the cars, and was told by the employees of the railroad company that he would get hurt. Defendant's testimony also shows that the father was advised that his boy, Oscar, was in the habit of coming to the defendant's grounds, and jumping off and on cars, and that he ought to chastise him for it. The father does not deny in his testimony but that he was told of the custom of his boy in playing about the grounds at the depot, but claims it was about a year previous, and that he had cautioned Oscar about playing about the grounds, and when at home would not allow him to play about the depot, and gave him particular instructions not to do so. The father was a barber, and left home early in the morning for his work, returning to his meals, and was absent during the day and evening. On the day in question the

father was away from home. The boy had been to school, crossing the railway track on his way home. Mrs. Baker testified that he got home at four o'clock, got a lunch, and went into the yard to play, back of the house; that she looked out and saw him twice playing there; and within twenty or twenty-five minutes after he first went out to play she heard of his injury upon the railroad track; and until that time she did not know he was out of the yard. We think, under these circumstances, it was a question of fact for the jury to determine whether the plaintiff or Mrs. Baker was guilty of such negligence that the plaintiff could not recover. We find no error in that part of the charge.

For the errors pointed out, however, the judgment must be reversed, with costs, and a new trial ordered.

JUDGMENT — CONCLUSIVENESS OF. — The only matter essential to making a former judgment conclusive between the parties is, that the question to be determined in the second action is the same judicially settled in the first: *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71; or that the particular controversy sought to be concluded was necessarily tried and determined in the former suit: *Haines v. Flinn*, 26 Neb. 380; 18 Am. St. Rep. 785.

PARENT AND CHILD. — Earnings of minor son belong to father: *Gilley v. Gilley*, 79 Me. 292; 1 Am. St. Rep. 307; *Halliday v. Miller*, 29 W. Va. 424; 6 Am. St. Rep. 653; until the son is emancipated: *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179; 23 Am. St. Rep. 327, and note.

PARENT AND CHILD. — For an injury to a minor child, the father may maintain an action for the loss of service, expenses, etc., but the right of action for the personal injury still remains in the child: *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 249; *Rogers v. Smith*, 17 Ind. 323; 79 Am. Dec. 483.

CONTRIBUTORY NEGLIGENCE OF PARENT, WHEN IMPUTED TO CHILD. — If a child is too young to be capable of taking care of himself, it is the duty of his proper custodian to care for him; and in an action to recover for injuries caused by the negligence of another, if his custodian was guilty of negligence, that negligence is imputed to the child: *Casey v. Smith*, 152 Mass. 294. Contra, see *Wymore v. Mahaska County*, 78 Iowa, 396; 16 Am. St. Rep. 442; *Western U. Tel. Co. v. Hoffman*, 80 Tex. 420; 26 Am. St. Rep. 759.

HOPKINS v. BISHOP.

[91 MICHIGAN, 528.]

REPLEVIN AGAINST OFFICER — DEMAND. — An owner of personal property may maintain replevin, without prior demand, against an officer who has taken it under attachment or execution against a third person in whose possession it was found.

SALE — CHANGE OF POSSESSION. — When there is not such a change of possession as will remove the presumption that the sale is fraudulent, it is still open to the purchaser to show that the sale was made in good faith, and without any intent to defraud creditors.

SALE — TEMPORARY CHANGE OF POSSESSION — BURDEN OF PROOF. — When a son sells a stock of goods to his father, notifying his clerk and creditors of the sale, and delivering the key of the store to the purchaser, there is in law a sufficient immediate delivery; but if the purchaser, who is not a merchant, does not remain in the store, and returns the key thereof to the vendor a few days after the sale, and employs him to sell the goods, so that, so far as outward appearances are concerned, the son is running the business after the sale the same as before, there is not such continued change of possession as will remove a presumption that the sale is fraudulent; and the burden of proof is upon the purchaser to show that it was *bona fide* and without intent to defraud creditors.

SALES — CHANGE OF POSSESSION — EMPLOYMENT OF VENDOR. — When a son sells his father a stock of goods, and delivers the key of the store to him, there is in law a sufficient immediate delivery, and if the purchaser afterwards goes into the store and assumes the management, the mere fact that he employs the vendor to assist him in the business or its management will not militate against his actual and continued possession of the goods.

SALE — CONTINUITY OF CHANGE OF POSSESSION. — When a father purchases a stock of goods from his son, the purchaser need not remain in the store and personally manage the business, in order to constitute such change of possession as will make the sale valid against creditors of the vendor. He may employ an agent to manage the business, but he cannot select his vendor as such agent, unless something is done to give the public to understand that the possession of the vendor is the possession of the purchaser, and that there has been an open, visible, and substantial change in the possession of the goods.

JURY TRIAL — PRACTICE. — A court has no right to send an answer to the jury-room to a question propounded in writing to him by the jurors, after they have retired to deliberate upon their verdict, without the consent of counsel in the case.

C. O. Smedley, for the appellant.

D. C. Lyle, and Stuart and Knappen, for the respondent.

MORSE, C. J. The defendant, as sheriff of Kent County, represents in this litigation attaching creditors of Clinton H. Hopkins, a son of the plaintiff. The plaintiff brought replevin for the goods attached, and recovered judgment in the Kent County circuit court.

It was shown by the plaintiff on the trial that his son, who was in the mercantile business at Cedar Springs, was unable to meet his obligations, and that plaintiff was signer of two notes, with his son, to one McBryer, for the means with which to engage in business. These notes were for \$1,000 and \$800, and there was due upon them, December 15, 1890, \$1,898. On that day plaintiff took up these notes and gave his individual note in their stead, and his son gave him a bill of sale of the stock and fixtures in his store, estimated to be worth fifteen hundred dollars. The book-accounts, amounting to about seven hundred dollars, and what cash there was on hand, were retained by the son. Plaintiff then went to the store with his son, who delivered the key to him, and informed the clerk that plaintiff was thereafter to be proprietor. Plaintiff then hired the clerk and his son to run the business for him. Two days thereafter, the attachment levies were made. December 23, 1890, plaintiff replevied without making any demand for the goods.

It is contended that a demand should have been made, as the goods were found in the possession of the son, Clinton H. Hopkins, against whom the writs of attachment ran. Authorities are cited to the effect that where property seized on attachment or execution is found by the officer in the actual custody of the person named in the writ, the possession under the levy is lawful, and a demand is necessary before replevin can be brought.

In this state, a demand before suit is not requisite, if, at the time of the levy, the goods seized are the property of the person suing in replevin. The fact that such goods are in the lawful possession of the person named in the writ of attachment or execution does not affect the right of the owner as against one taking possession of them in hostility to him. The question of demand before suit by the owner to regain possession of his property depends upon whether the taking was lawful as against him. If the plaintiff in this case had a right to recover this property from the sheriff, no demand was necessary. The sheriff may have, in good faith, levied upon these goods, believing them to be the property of Clinton H. Hopkins; but as the right of plaintiff to regain possession of them does not at all depend upon the good faith of the officer in taking them, there is no good reason, as shown in *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795, for a demand before suit. The taking, if the plaintiff was owner, was a tres-

pass, and would itself have constituted a conversion in trover without proof of a demand and refusal.

There are several assignments of error to the refusal of the circuit judge to give defendant's request to charge. These requests are not set out in the bill of exceptions, nor in the printed record, except as they appear in the assignments of error. These assignments form no part of the bill of exceptions, and we cannot presume against the validity of a judgment that a request to charge, not found in the bill of exceptions, was presented to the circuit judge, from the mere fact that such request is set out in the assignments of error. The assignments, therefore, as to the requests not given by the court will not be considered: *Lindner v. Hine*, 84 Mich. 512.

It is assigned as error that the circuit judge modified the tenth request of defendant, which was as follows: "The sale must be accompanied by an actual and continued change of possession as well as a nominal and constructive change, or the transaction will be deemed fraudulent as against creditors; and a construction which would allow the vendor or assignor of a stock of goods to continue in possession thereof, and to sell them out as the agent of the purchaser or assignee, would render this statutory provision for the prevention and detection of frauds a mere nullity,"—by adding to the same: "That is, if you should find that Clinton H. Hopkins was left there in charge of the goods, to sell out, as a mere figure-head, and there was not an honest and open transfer."

It is claimed that this request, as presented, was good law, and applicable to the case, under the ruling of this court in *Doyle v. Stevens*, 4 Mich. 93; citing with approval the language of the court in *Butler v. Stoddard*, 7 Paige, 166. But it was held in *Doyle v. Stevens*, 4 Mich. 93, that if there was any evidence tending to show an open outward change of possession and a continuation of it, it would be a question of fact for a jury. In this case the transaction between the plaintiff and his son was not concealed from any one. The day the alleged sale took place the fact was made known to McBryer, who was a creditor to the extent of over eighteen hundred dollars, and the clerk in the store was made acquainted with the change. All the possession that could have been taken was taken, except the putting out of the son as an employee, and the going in of the plaintiff to manage the store personally. The plaintiff was not a merchant, and unless he was pre-

cluded, as a matter of law, from hiring the son to manage the business for him, the question whether or not there was such a change of possession as satisfied the statute was one for the jury to determine. We do not think the defendant was entitled to the request as worded, as it left out an important element, to wit, that even where there is not such a change of possession as will remove the presumption that the sale is fraudulent, it is still open to the purchaser to show that the sale was made in good faith, and without any intent to defraud creditors.

But it is further contended that this modification of the request placed the burden of proof upon the defendant to show that the transfer was fraudulent as against creditors, when the fact appearing, as it did, that the son was left in the full management of the business negatived the idea of an actual and continued change of possession, and therefore put the burden, under the statute (Howell's Statutes, sec. 6190), upon the plaintiff. And in this connection complaint is made of the charge of the court as follows: "And, indeed, in order to constitute a valid delivery and change of possession, it is not necessary that the buyer himself should actually have ever been present in the store or where the property is, but if you believe that an actual sale was made to the plaintiff, he could authorize his son or any other person to take possession for him and hold possession."

And it is also averred that the statement by the court that the burden of proof was upon the defendant to show fraud in this case also tended to lead the jury to believe that it was for the defendant, under the circumstances of the case, to prove that the transfer was a fraudulent one.

A careful examination of the charge of the court shows that the burden of proof was put upon the defendant to show that this sale was fraudulent as against creditors, without any reference to what the jury might find as a fact as to an actual and continued change of possession of the goods. This was error. There is no doubt that there was in law a sufficient immediate delivery; and if, upon the delivery of the key to plaintiff, he had gone into the store and assumed the management of it, the mere fact of his hiring his son to help him in the business or the management of it would not have militated against his "actual and continued possession" under the statute; but there was testimony tending to show that the key was returned to the son a few days afterwards, and that, so far as

any outward evidence was concerned, the son was running the business after the sale the same as before. The jury should have been instructed that if they found that the possession of these goods was not actually and continually in the plaintiff from the delivery up to the time of the levy, then it was for him to show that the sale was an honest one. It would not be necessary that the plaintiff himself should remain at the store and personally manage the business. He had the right to select an agent to do this for him. But he could not select a vendor of the goods as such agent, unless something was done to give the public to understand that the possession of the vendor was the possession of the plaintiff, and that there had been a change in the ownership of the goods. This change must be an "open, visible, substantial" one: *Clark v. Lee*, 78 Mich. 231.

The court had no right to send an answer to the jury-room to a question propounded in writing to him by the jurors, after they had retired to deliberate upon their verdict, without the consent of counsel in the case.

The judgment is reversed, and a new trial granted, with costs of this court to defendant.

REPLEVIN AGAINST OFFICER, WHEN IT WILL LIE: See note to *State v. Lawson*, 9 Am. St. Rep. 44. Demand before suit is necessary, where one obtains possession of property lawfully: *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118; *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184; but is not necessary where the taking of the property is tortious: *Galvin v. Bacon*, 11 Me. 28; 25 Am. Dec. 258; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118; or where the person in charge of the property disposes of it without authority, notwithstanding the property is in the hands of a *bona fide* purchaser without notice of the owner's title: *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795.

FRAUDULENT CONVEYANCES — RETENTION OF POSSESSION OF CHATTELS BY SELLER. — Whether retention of possession by the seller of chattels is fraud *per se*, or only evidence of fraud, is a question as to which there is a conflict of authority. The cases in this series in which the former view is adopted are *Sturtevant v. Ballard*, 9 Johns. 337; 6 Am. Dec. 281; *Hundley v. Webb*, 3 J. J. Marsh. 664; 20 Am. Dec. 189; *Jennings v. Carter*, 2 Wend. 446; 20 Am. Dec. 635; *Clark v. French*, 23 Me. 221; 39 Am. Dec. 618; *Brown v. Keller*, 43 Pa. St. 104; 82 Am. Dec. 554; *Babb v. Clemson*, 10 Serg. & R. 419; 13 Am. Dec. 684; *Thornton v. Davenport*, 1 Scam. 296; 29 Am. Dec. 358; *Born v. Shaw*, 29 Pa. St. 288; 72 Am. Dec. 633; *Boardman v. Keeler*, 1 Aikens, 158; 15 Am. Dec. 670; *Batchelder v. Carter*, 2 Vt. 168; 19 Am. Dec. 707; *Streeper v. Eckert*, 2 Whart. 302; 30 Am. Dec. 258; *Crouch v. Carrier*, 16 Conn. 505; 41 Am. Dec. 156; *Calkins v. Lockwood*, 17 Conn. 154; 42 Am. Dec. 729; *Waller v. Todd*, 3 Dana, 503; 28 Am. Dec. 94; *Jarvis v. Davis*, 14 B. Mon. 424; 61 Am. Dec. 166; *Renninger v. Spatz*, 128 Pa. St. 524; 15 Am. St. Rep. 692;

Stephens v. Gifford, 137 Pa. St. 219; 21 Am. St. Rep. 868. The view that the possession is only *prima facie* evidence of fraud is adopted in *Barrow v. Paxton*, 5 Johns. 258; 4 Am. Dec. 354; *Beals v. Guernsey*, 8 Johns. 446; 5 Am. Dec. 343; *Mason v. Baker*, 1 A. K. Marsh. 208; 10 Am. Dec. 724; *Oaklen v. Thompson*, 3 Yerg. 475; 24 Am. Dec. 587; *Briggs v. Parkman*, 2 Met. 258; 37 Am. Dec. 89; *Shaddon v. Knott*, 2 Swan, 358; 58 Am. Dec. 63; *Brooks v. Powers*, 15 Mass. 244; 8 Am. Dec. 99; *Richmond v. Crudup*, Meigs, 581; 33 Am. Dec. 164; *Fleming v. Townsend*, 6 Ga. 103; 50 Am. Dec. 318. In many states the question has been settled by statute.

FRAUDULENT CONVEYANCES — TEMPORARY POSSESSION BY VENDER. — Whichever of these opposing views may be deemed correct, it is universally admitted that the character of the transaction is not changed by a temporary change of possession: *Morris v. Hyde*, 8 Vt. 352; 30 Am. Dec. 475; *Mills v. Warner*, 19 Vt. 609; 47 Am. Dec. 711. Still less will a mere formal and constructive taking of possession, and then leaving the property in the actual possession of the vendor, be enough to exclude a presumption of fraud: *Murch v. Swensen*, 40 Minn. 42. See also, generally, the extended note to *Clafin v. Rosenberg*, 97 Am. Dec. 340-348.

EMPLOYMENT OF SELLER, HOW FAR A BADGE OF FRAUD. — In the note to *Clafin v. Rosenberg*, 97 Am. Dec. 344, will be found some authorities relating to the question whether the employment of the former owner as agent or clerk of the vendee will avoid the sale. The weight of authority seems to be against the validity of such an arrangement: *Fitzgerald v. Gorham*, 4 Cal. 289; 60 Am. Dec. 616; *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 282; *Stephens v. Regenstein*, 89 Ala. 561; 18 Am. St. Rep. 156. The decision in the last-mentioned case is based upon the ground that "one of the direct results of the sale was, that by the agreement the failing debtor secured to himself a paying employment, which, but for the sale and agreement, he could not have had."

BURNS v. KIRKPATRICK.

[91 MICHIGAN, 364.]

TRESPASS — WHAT CONSTITUTES. — A brother who assists his sister and acts under her direction in forcibly removing the household goods of her husband from the house of the latter is liable to him in trespass therefor.

EVIDENCE — CROSS-EXAMINATION OF WITNESS. — In an action of trespass by a husband against his wife's brother for helping her in forcibly removing household goods from the husband's house, statements made by the wife at the time of the removal, but not in the presence of her husband, cannot be drawn out on the cross-examination of a witness who has not testified to any conversation with the wife.

T. B. White, for the appellant.

John Power, for the respondent.

GRANT, J. Action of trespass *de bonis asportatis*. Plaintiff had verdict and judgment for the value of the goods taken.

Plaintiff was a householder living with his family, which consisted of his wife, three children, and his mother-in-law. The defendant is his brother-in-law, and on the evening of December 29, 1890, went to the plaintiff's house. A fight, the occasion and details of which it is unnecessary to give, occurred between them. Plaintiff, evidently getting the worst of the fight, ran away from the house, leaving the defendant there. Mrs. Burns, the defendant, and his brother then moved the household goods from plaintiff's house to the defendant's, after which they were taken by Mrs. Burns to her new home.

The defendant relies upon the following errors: 1. The circuit judge erred in rejecting the testimony as to what Mrs. Burns said when she was assisting in removing the property in question. 2. The circuit judge erred in making the sarcastic and irrelevant remark in relation to "saving the property for his sister." 3. The court erred in charging the jury that the defendant is liable to the plaintiff for the value of the goods taken. 4. The court erred in refusing to charge the jury that if they found the goods in question consisted of household furniture and provision, used by the plaintiff and his wife in their housekeeping, the wife had a joint right of possession with her husband, and, as such, could exercise care and control over the same. 5. The court erred in refusing to charge the jury that if they found that the defendant took said property and carried it away at the request of the wife, and acted only under her supervision and instruction, and with her aid and assistance, and that said goods had never been out of the custody and control of the wife, the plaintiff could not recover in this action. 6. The court erred in refusing to charge the jury that there was no cause of action in this case, and in not directing them to bring in a verdict for the defendant.

1. The principal defense was, that the defendant was acting under the direction of Mrs. Burns; that he did not convert the goods to his own use, and therefore is not liable. The act of removal was a tort, and the defendant is liable, notwithstanding he acted under the direction of Mrs. Burns. The learned circuit judge was therefore correct in instructing the jury to render a verdict for the plaintiff for the value of the goods taken. If Mrs. Burns had a just cause of complaint against her husband, the law provided her a remedy which she should have followed. The defendant, a stranger, had no right to enter the plaintiff's home, drive him therefrom, and then as-

sist her in removing the property, the title to which was in him, though he could not dispose of it without her assent.

2. The court correctly rejected the testimony as to what Mrs. Burns said when the property was being removed. The witness saw the defendant and his brother loading the property on a sleigh, and had a conversation with them, to which he had testified. He had not testified to any conversation with Mrs. Burns. Defendant sought to elicit this conversation on the cross-examination of the witness. Plaintiff was not present, and nothing that she then said could have justified the defendant's action.

3. Mrs. Burns was a witness for the plaintiff, and had testified to the conduct of the defendant on the occasion, and that he had kicked over the table and broken the dishes, when the court remarked, "To save the property, I suppose, for his sister." Even if the remark were error, I do not think it so prejudicial, under the facts in this case, as to justify a reversal. The only question left to the jury was the assessment of damages.

Judgment affirmed.

TRESPASS, WHAT CONSTITUTES. — Any unlawful interference or exercise of dominion with respect to the property, by which the owner is damaged, is a trespass: *Phillips v. Hall*, 8 Wend. 610; 24 Am. Dec. 108; *Haythorn v. Rushforth*, 19 N. J. L. 160; 38 Am. Dec. 540. In trespass all are liable who participate in the wrongful act, either by aiding in, advising, or assenting to it: *Ross v. Fuller*, 12 Vt. 265; 36 Am. Dec. 342; *Brittain v. McKay*, 1 Ired. 265; 35 Am. Dec. 738; *State v. Smith*, 78 Me. 260; 57 Am. Rep. 802. To establish the liability of party in trespass, committed by more than one, it is only necessary to show that he participated in the wrong done: *Allred v. Bray*, 41 Mo. 484; 97 Am. Dec. 283; or that he was present at the commission of the trespass, and in some way countenanced or approved the same: *McManus v. Lee*, 43 Mo. 206; 97 Am. Dec. 386.

CROSS-EXAMINATION OF WITNESS. — A defendant has no right to cross-examine plaintiff's witness as to matters of defense which have no dependence upon or necessary connection with his direct testimony, but the defendant must make the witness his own witness as to such testimony: *Mitchell v. Welch*, 17 Pa. St. 339; 55 Am. Dec. 557. Witness may not be asked, on cross-examination, a question which does not tend to rebut, impeach, modify, or explain any of his testimony: *Atchison etc. R. R. Co. v. Gants*, 38 Kan. 608; 5 Am. St. Rep. 780. But cross-examination as to new matter, when it is part of the *res gestæ*, is allowable: *Bank v. Fordyce*, 9 Pa. St. 275; 49 Am. Dec. 561.

LANSING IRON AND ENGINE WORKS v. WALKER.

[91 MICHIGAN, 409.]

FIXTURES — CONDITIONAL SALE. — When a portable saw-mill is sold to the owner of an undivided interest in a farm, with permission to the vendee to take and use the mill thereon and in adjacent townships, the vendor retaining the title and right of possession until the mill is fully paid for, and the vendee, after making part payment, sets up the mill on his farm, bricking in and arching up the boiler, setting the engine on brick-work and bolting it thereto, roofing the engine and boiler, but leaving the mill and carriage uncovered, they do not thereby become fixtures so as to pass as such to a subsequent purchaser of the farm. After a refusal to pay the remainder of the purchase price, he is liable in trover for the mill.

Thomas E. Barkworth, for the appellant.

Cahill and Ostrander, for the respondent.

McGRATH, J. In November, 1886, plaintiff and one Myers entered into a written contract, by the terms of which plaintiff agreed to sell to Myers "one stationary Standard sawing rig, complete, which includes one 30-horse-power engine, 10 x 16; No. 5 boiler, with throttling or automatic governor, whichever is considered best, with all boiler fixtures; Standard mill, complete, with 54-inch planer, saw, belting, pipes, and connections, etc.; and one picket-mill, with 36-inch solid saw, with friction feed, etc., rigged for cutting pickets, $\frac{1}{2}$ in. and up, with proper shafting and pulleys, to run with or without the above Standard saw-mill. Said machinery to be ready for delivery at the Lansing Iron Works, Lansing, Mich., on or about the 28th day of November, 1886. . . . It is further agreed that the title and right of possession of the aforesaid machinery shall remain in the above first party until the price is paid in full, according to the notes accompanying this contract, when the same shall vest in the party of the second part. But it is also agreed that the second party may take said machinery, when completed and delivered, and run the same in the township of Sandstone, county of Jackson, and in adjacent townships, and retain and use it so long as he takes reasonable care of the same, and is not in default in any of his payments as herein provided."

Payments were to be made under said contract, \$150 on or before the delivery of the machinery, \$350 on or before June 1, 1887, and the balance in two annual payments.

Myers paid the \$150, and the machinery was delivered to him. He owned an undivided interest in a farm in the town-

ship of Sandstone, to which he removed the machinery, and set it up. The boiler was bricked in and arched up, and the engine was set upon brick-work, and bolted down to the foundation. The boiler and engine were covered over, — a part with a board roof and a part with a shingled roof. The saw-mill and carriage were uncovered. In February, 1888, Myers conveyed the farm by quitclaim deed to the defendant, and trover is brought by reason of the refusal to pay the balance due plaintiff under the agreement between plaintiff and Myers. The court directed a verdict for plaintiff for the amount of the balance, and defendant appeals.

Defendant contends that the case should have been submitted to the jury upon the question of fact raised by the testimony as to whether the purchase made by defendant from Myers was one made in good faith for a valuable consideration, and without notice of any claim of the plaintiff against the property purchased.

The case is ruled by *Adams v. Lee*, 31 Mich. 440, and *Robertson v. Corsett*, 39 Mich. 777.

In *Adams v. Lee*, 31 Mich. 440, the court say: "All the time, therefore, the parties have had title to the machinery distinct from their title to the land, and this fact of itself is conclusive that the former was personalty; for, to constitute a fixture, there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixture also. When the ownership of the land is in one person, and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only. And the fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter cannot render the former a fixture, when the interests are different in extent. A thing cannot, as to an undivided interest therein, be real estate, and as to another undivided interest be personalty. It must be the one thing or the other. And the position which is taken by Lee in this case involves this absurdity: that Kaufman, at the time when he and Kinney were severally the owners of an undivided half of the land, might have sold that, and, as a necessary consequence, transferred an undivided one half of the machinery also, though the whole of the machinery belonged to Kinney

as exclusive owner. This would be the necessary result if the machinery was real estate; for there could be no such a thing as attaching it to an undivided interest in the land only."

In *Morrison v. Berry*, 42 Mich. 389, 36 Am. Rep. 446, the ownership of the land and of the thing affixed was in one and the same person. It was there held that the annexation of the thing to the freehold was not the wrongful act of the landowner, but that, by act and intervention of the claimant, the article became a part of the freehold.

In *Knowlton v. Johnson*, 37 Mich. 47, T. owned the land and mill. S. was the lessee. The water-wheels were a part of the structure. Plaintiffs furnished the water-wheels to S., with the understanding that they were to be put in the mill, and there used; and against the objection of T., the old wheels were taken out and the new put in. Six months afterwards, S. surrendered his lease, and T. leased to M. T. finally sold the mill property to defendant, and plaintiffs brought trover. The court say: "The plaintiffs deliberately agreed that the water-wheels should be converted in all outward appearance into real property, and they thereby put it in the power of Trimmer to make sale of the wheels as part of the mill."

In the present case, the contract of sale provided for the use of the machinery, not only in the township of Sandstone, but in adjoining townships. Myers was not the sole owner of the land upon which it was placed, but he was sole owner of the interest in the machinery, and operated it solely in his own behalf. The structure covering the boiler and engine was but a temporary one. The machinery in question did not consist simply of a pulley, shaft, or wheel which was to be attached to other machinery already a part of a saw-mill, and as such a part of the realty, but it was a complete outfit, designed by the agreement to be portable. There was nothing done by plaintiff indicative of an intent to permit the machinery to be so annexed to realty as to change its character. The state of the title to the realty, and the conduct of Myers regarding the machinery, negatived any intent on his part to allow his interest in the machinery to be absorbed by the owners of the realty, or to permit it to be merged. The circumstances of the purchase by defendant clearly indicate that he took the entire interest in this machinery, while he took but an undivided interest in the realty. He afterwards operated the machinery as sole owner.

It was held in *Wheeler v. Bedell*, 40 Mich. 693, 696, that there is no universal test by which the character of what is claimed to be a fixture can be determined in the abstract; neither the mode of annexation nor the manner of use is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned.

In *Coleman v. Stearns Mfg. Co.*, 38 Mich. 30, 40, the court, commenting upon a line of authorities which seem to regard the manner of the attachment to the realty as the test, say: "This, however, is a very extreme view, and is hardly compatible with the tenor of our own previous decisions. It seems to overlook or ignore one test, and frequently the most important test, namely, the intent of the party making the annexation." See also *Manwaring v. Jenison*, 61 Mich. 117.

The judgment is affirmed.

FIXTURES, WHAT ARE: See monographic notes to *Hunt v. Mullanphy*, 14 Am. Dec. 303, 304; *Gray v. Holdship*, 17 Am. Dec. 686-696. As to what are regarded as fixtures so as to pass in a conveyance of the realty, see discussion at the close of the opinion in *Wadleigh v. Janvrin*, 41 N. H. 503; 77 Am. Dec. 780. As to tests for determining what are fixtures, see notes to *Lavenson v. Standard Soap Co.*, 13 Am. St. Rep. 153-156 (between mortgagee and purchaser); *Hopewell Mills v. Taunton Sav. Bank*, 15 Am. St. Rep. 239 (between mortgagee and purchaser); *Roseville Alta Mining Co. v. Iowa Gulch Mining Co.*, 22 Am. St. Rep. 376 (execution sale). By the term "fixture," in its legal sense, is meant something so attached to the realty as to become, for the time being, a part of the freehold, as contradistinguished from a mere chattel; *Carlin v. Ritter*, 68 Md. 478; 6 Am. St. Rep. 467. Physical annexation to realty is not, without more, sufficient to change the character of personal property from a chattel to a fixture; the intention of the parties and the uses to which it is put are material factors in the determination of the question; *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471. As between vendor and vendee, articles of personalty affixed to the freehold pass by deed to the latter, and the intent of a vendor in placing a saw-mill, engine, and boiler upon land which he subsequently conveys is not competent to vary the terms of the deed; *Horne v. Smith*, 105 N. C. 322; 18 Am. St. Rep. 903. Fixtures become part of the realty so as to pass to a *bona fide* purchaser thereof, who has no notice of the interest of a third person therein; *Tibbets v. Horne*, 65 N. H. 242; 23 Am. St. Rep. 31. The decision of the court in the principal case would probably not be followed in a good many states; but there is no lack of precedents to support the view adopted: See, for example, *Hendy v. Dinkerhoff*, 57 Cal. 3; 40 Am. Rep. 107; *Hunt v. Mullanphy*, 1 Mo. 508; 14 Am. Dec. 300. In the latter case, it was held that a boiler situate in a house on mortgaged premises, made of copper, and built into a furnace erected for that purpose, but capable of removal without injury to the building, was not a fixture, as between mortgagor and mortgagee. The conflict of opinion as to what are to be deemed fixtures, when the question arises between vendor and vendee, will, we think, be found to be due to the difficulty there is in deciding what weight is to be given to the intention

and agreement of the parties, having at the same time due regard to the presumption that the vendee takes all the visible appurtenances that seem to be annexed to the freehold. There is a very full review of the authorities on this vexed subject in *McRea v. Central National Bank*, 66 N. Y. 489; quoted at length in the note to *Ottumwa Woolen Mill v. Hawley*, 24 Am. Rep. 726-732. In *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235, it is said that the modern tendency is to make the question as to what are fixtures "a question of the intention with which the chattel was put into place," — that intention, however, being, "not the undisclosed purpose of the actor, but the intention implied and manifested by the act."

REYNOLDS v. SCHAFFER.

[91 MICHIGAN, 494.]

WITNESSES — COMPETENCY OF WIFE. — In an action by a husband for carnally debauching and knowing his wife and alienating and destroying her affection for him, she is not a competent witness in his behalf.

SECTION 7546 of Howell's Michigan Statutes, referred to in the opinion, is as follows: "A husband shall not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent, except in cases where the husband or wife shall be a party to the record in a suit, action, or proceeding where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through, or under the husband or wife so called or offered as a witness shall be the subject-matter in controversy or litigation in such suit, action, or proceeding, in opposition to the claim or interest of the other of said married persons who is a party to the record in such suit, action, or proceeding; and in all such cases such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto without the consent of said husband or wife who is a party to the record in such suit, action, or proceeding as though such marriage relation did not exist; nor shall either, during the marriage, or afterward, without the consent of both, be examined as to any communication made by one to the other during the marriage; but in any action or proceeding instituted by the husband or wife in consequence of adultery, the husband and wife shall not be competent to testify."

James Van Kleeck, for the appellant.

F. L. Prindle, and Cahill and Ostrander, for the respondent.

MORSE, C. J. Plaintiff sued defendant for carnally debauching and knowing plaintiff's wife, Rhoda Reynolds, and alienating and destroying her affection for her husband. On the trial, plaintiff offered his wife as a witness in his behalf. Upon objection by defendant's counsel, the court below held that she was not a competent witness. The plaintiff also offered in evidence a letter written to him by his said wife, previous to the wrongful acts of the defendant, to show the relation that then existed between plaintiff and wife. This offer was rejected. No further evidence was offered by plaintiff, and the court directed a verdict for the defendant.

The direction was right. The case is ruled by *Mathews v. Yerex*, 48 Mich. 361, where it is held that the wife is not a competent witness for her husband in a suit of this kind. See also Howell's Statutes, sec. 7546.

It is not necessary to determine whether the letter was admissible. It could have no force in the case, standing alone, without any proof of the criminal conversation.

The judgment is affirmed, with costs.

WITNESSES — COMPETENCY OF HUSBAND OR WIFE IN ACTIONS BY ONE OR THE OTHER. — A husband is incompetent to testify in a civil suit in which the wife is a party: *Cramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594. In an action by a husband for enticing away his wife, he may give in evidence her declarations, made shortly before the seduction, to show her feelings toward him at that time; but it is erroneous to admit on this ground declarations of the wife concerning the words and acts of the defendant, and tending to prove the charges against him, as such evidence is merely hearsay: *Preston v. Bowers*, 13 Ohio St. 1; 82 Am. Dec. 430. The wife is an incompetent witness against the husband on a prosecution against him for incest with her daughter, his step-daughter: *Compton v. State*, 13 Tex. App. 271; 44 Am. Dec. 703. In an action for damages for injuries to the wife's person, the husband has an interest, and the wife is not a competent witness: *Norfolk etc. R. R. Co. v. Prindle*, 82 Va. 122. The husband or wife, in West Virginia, under the statutes, may give evidence for or against each other in any civil action, except that they may not disclose confidential communications made during marriage: *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622. The same rule exists in Connecticut: *Merriam v. Hartford etc. R. R. Co.*, 20 Conn. 354; 52 Am. Dec. 344. A divorced wife is a competent witness, in an action for criminal conversation brought by her husband, to prove criminal intercourse with her during marriage: *Dickerman v. Graves*, 6 Cush. 308; 53 Am. Dec. 41, and note.

McNALLY v. COLWELL.

[91 MICHIGAN, 527.]

FIRES — HABITS OF EMPLOYEES. — In an action against a mill-owner to recover for damages caused by fire spread from the accidental burning of his saw-mill, evidence that the fireman and engineer of the mill were in the habit of using intoxicating liquor, and were occasionally under its influence, is inadmissible to show negligence, in the absence of proof that such liquor habit or occasional intoxication had any bearing upon the origin of the fire, or anything to do toward preventing its extinction.

FIRES — LIABILITY FOR — NEGLIGENCE. — The owner of a saw-mill, surrounded by inflammable material, and in which a fire is liable to break out at any time, is bound to exercise only such care to prevent the destruction of surrounding property by accidental fire starting in such mill as a man of ordinary prudence and caution, under all the circumstances, would exercise in reference to property of the same kind similarly situated, and belonging to himself. But to operate such mill without any appliances or means at all to extinguish fires is negligence, as matter of law.

FIRES — DUTY AND LIABILITY OF MILL-OWNER IN RESPECT TO. — When fires are liable to originate in the engine or boiler rooms of a saw-mill, and the construction of the mill is such that the surroundings are inflammable, so that fire is liable to spread rapidly when once ignited, it is incumbent upon the person operating the mill to take care that fire shall not consume it and spread to other property, by keeping on hand, not only persons to watch the fire and keep it within the furnace, but also some appliances for extinguishing fire, in case it should accidentally escape and ignite some part of the building.

FIRES — LIABILITY OF MILL-OWNER IN RESPECT TO. — In an action to recover for damages to adjacent property, caused by accidental fire originating in a saw-mill, evidence of the practice and appliances used at other similar mills at different places, necessarily under different conditions and surroundings, is inadmissible to show negligence in the case under consideration.

FIRES — LIABILITY OF MILL-OWNER — EXPERT EVIDENCE. — In an action to recover for damages to surrounding property, caused by accidental fire originating in a saw-mill, no special or particular knowledge beyond that presumably open to a jury in a lumbering country is required to determine what means would be safe or ordinarily prudent to be used to put out fires in a boiler-room or saw-mill in a particular case, and expert evidence on this subject is inadmissible.

EXPERT EVIDENCE SHOULD BE RESTRICTED to those cases where its use is wellnigh indispensable because of questions of science or skill being involved, in which a special and peculiar knowledge is desired, in order to arrive at the exact truth.

FIRES IN MILL — LIABILITY — EVIDENCE. — In an action to recover for damages to surrounding property, caused by accidental fire in a saw-mill, evidence that one of the "hangers" in the boiler-room of such mill was charred by fire several years previously is irrelevant, and inadmissible to show negligence in the matter under consideration.

R. J. Kelley, for the appellant.

W. E. Depew and Frank Emerick, for the respondent.

MORSE, C. J. Plaintiff sued to recover for the value of certain pine lumber alleged to have been destroyed by fire through the negligence of the defendant. The plaintiff had verdict and judgment for \$2,636.

Colwell owned the only saw-mill in Harrisville, Alcona County, Michigan, and the lumber burned was piled on the docks, that ran from the mill out into the lake. This lumber was sawed and piled upon the docks by Colwell from logs owned by plaintiff, Colwell receiving a certain sum per thousand feet for sawing and piling. This lumber was on the docks awaiting shipment. The fire originated in the boiler-room of defendant's mill. A strong wind was blowing at the time from the direction of the mill towards the lumber. The mill was burned, and the fire spreading therefrom consumed the docks and lumber upon them. No fault was found with the construction of the boiler-room, and the question of defendant's negligence was submitted to the jury upon two points: 1. Was the defendant negligent in knowingly employing an engineer and fireman in the mill who were incompetent to perform their duties by reason of their use of intoxicating liquors? 2. Was the defendant negligent in not having the proper appliances in the mill for putting out fires that might arise there?

At the close of the direct evidence on the part of the plaintiff, defendant's counsel moved for a direction to the jury to find a verdict for the defendant. This the court refused, and, at the end of the trial, submitted the case to the jury upon the two propositions stated above.

The court was in error in submitting the first question to the jury. There was testimony tending to show that the engineer and fireman were in the habit of using intoxicating liquors, and were sometimes seen under the influence of such liquors; but such liquor habit or occasional intoxication was not shown to have had any bearing whatever upon the origin of the fire, or to have had anything to do towards preventing its extinction. In the case of *Cowley v. Colwell*, 91 Mich. 537, which was argued in this court in connection with this case, and which was an action for lumber destroyed by this same fire, the circuit judge, correctly as we think, upon nearly if not identically the same evidence as in this case, withdrew this question of the use of intoxicating liquors by these em-

ployees of the defendant from the jury. It should have been withdrawn in this case.

In the boiler-room of defendant's mill there was a water-tank about six feet high and five or six feet in diameter, filled with water from a pond which came up to the westerly end of the mill. The tank was supplied by a pipe leading from the pond, and there was sufficient head to keep it constantly filled. On the northerly side of the saw-mill was a grist-mill run by water, and the sluice for waste water ran between the two mills. There was also a sluice for the waste water of the mill-pond, which ran directly through the lower part of the saw-mill. The water was conveyed in a box about three feet wide by two feet deep, which stream of water was running through the mill at the time of the fire. At the time of the fire there were four or five pails in the mill, and one in the boiler-room, sitting under a faucet in the tank. There was no pump in the mill, nor any hose, at the time of the fire, although hose had been in use before that time for wetting down the boiler-room, but had become worn and useless.

The contention of plaintiff on the trial was, that there should have been a pony pump and sufficient hose in the boiler-room to throw water upon the walls, and that if there had been, the fire could have been extinguished when first discovered. The declaration averred negligence in this regard, in that the defendant "did not keep upon said premises any hose, or pails, or barrels of water, or axes, or the like, whereby, on the day and year aforesaid [July 6, 1888], a fire having broken out upon said premises, and there being no means of extinguishing the same, the fire was communicated to the said lumber of the plaintiff, and the same was wholly lost and destroyed."

This is a peculiar case. No negligence is charged in the origin of the fire, but the defendant is sought to be held liable because he neglected to keep upon his premises proper and sufficient appliances to prevent the spread of an accidental fire starting upon his premises and within the inclosure of his boiler-room in his mill. Nearly all of the cases found in the books have arisen from negligent fires communicated from sparks from locomotives and steamboat smoke-stacks, or from manufacturing chimneys, or from fires set out in the open air upon the premises of the owner, and escaping therefrom. The question here is a new and novel one to me. If there is any liability here, from what duty does it arise? and what is the extent of the duty, if there be one, of the owner of a house,

store, barn, mill, or other building, who has taken every and all necessary precaution to prevent the breaking out of a fire within the building, to keep in such building appliances for extinguishing fire, and to prevent its spreading to the property of others? Does the same rule apply to a mill that would govern the case of a store, barn, or dwelling-house? and if not, why not?

The circuit judge instructed the jury that the defendant, in reference to the property of the plaintiff, was bound to exercise such care, and no more, to prevent the destruction of the same by fire as a man of ordinary prudence and caution, under all the circumstances, would exercise in reference to property similarly situated, of the same kind and character, belonging to himself; that he was not obliged, as a matter of law, to have a pony pump or hose in his mill; he could have pails if he saw fit, provided the jury found that pails would so protect from the spread of fire, that an ordinarily prudent man would have used them under like circumstances.

The claim that the defendant ought to have had a pony pump upon his premises should not have been permitted under the pleadings, as there was no allegation in the declaration that it was the duty of defendant to have such a pump, or that he was negligent in not having it; nor do I think that he was obliged to have and keep hose in the mill, under the circumstances of its situation and surroundings.

After much research I have been unable to find a case at all like the present, or anything in the text-books bearing directly on the question involved here. If a fire is carefully set and maintained within one's own building, in the management of a lawful business, and all proper precaution taken to prevent its escape, what is the duty of the owner of the building, in case fire does occur, or escape by accident, as to keeping on hand, within the building, appliances to prevent the spread of such fire, and to extinguish it?

Under the old common law of England, one whose house or building was burned by accident was liable for the destruction of his neighbor's property caused from the fire communicated from such burning house or building. This rule was so manifestly unjust that in 1707 Parliament passed an act providing that no action should be maintained "against any person in whose house or chamber any fire shall accidentally begin": 6 Anne, c. 31, par. 67. This statute, being enacted before the separation of the colonies from the mother country,

is generally accepted as a part of our common law. In 1774 this statute was extended to fires originating in a "stable, barn, or other building," or on the estate of any person: 14 Geo. III., c. 78, par. 86. This last statute is not so generally accepted as part of the common law of this country by our courts. It is said in Shearman and Redfield on Negligence, 4th ed., sec. 665, that both of these statutes are part of our common law; but it is held in some of the states that the latter statute, being passed on the eve of our Revolution, never became a part of our common law: *Spaulding v. Chicago etc. R'y Co.*, 30 Wis. 110; 11 Am. Rep. 550. These statutes, however, have generally been held to relieve the owner of real property from the consequences of the spread of fire from his premises only in cases where the fire results from pure accident, free from any culpable negligence: Shearman and Redfield on Negligence, 4th ed., sec. 665.

I am satisfied that in case of a dwelling-house or chamber there could be no liability against the owner for property destroyed by a fire accidentally, and without negligence, beginning in such dwelling-house because, in the opinion of a jury, he did not keep on hand at all times proper appliances to put out a fire, in case one should accidentally arise. And the same rule would apply to stables, barns, and outbuildings, where fire was not kept for the purpose of manufacturing, but for domestic uses. But I am inclined to think there is a difference between fires kept in a house or other building for domestic purposes and fires for the generation of steam to run machinery, or in blast and other furnaces used for manufacturing purposes. The care to be used must always be in proportion to the risk involved. If properly and carefully set and managed, the breaking out of fire in dwelling-houses and buildings used for domestic purposes is an uncommon occurrence, and one not to be generally expected; but in the use of fire for manufacturing purposes the risk is greater, and constant care is in some cases required to prevent its escape, and accidental fires are more frequent. If, therefore, fires are liable to originate in engine and boiler rooms, and the construction of the mill is such that the surroundings are inflammable, so that the fire is liable to spread rapidly when once ignited, it would be incumbent upon the person operating the mill to take care that the fire should not consume the mill, and spread to other property, by keeping on hand, not only persons to watch the fire and keep it within the furnace, but some appliances for

extinguishing fire in case it should accidentally escape and ignite some part of the building. The fire in the boiler or engine room should not only be well guarded to prevent accidental fires, but some provisions ought to be made to prevent such fires spreading, and to extinguish them. This would suggest itself, it seems to me, to an ordinarily prudent man in the care of his own property.

“The careful setting and keeping of fires in one’s dwelling-house, shop, field, or elsewhere, for a useful purpose, creates no liability to another injured by its spreading, through some accident not reasonably to be anticipated. But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor’s property and destroys it, will give the neighbor an action for the damages”: Bishop on Non-Contract Law, sec. 833.

Could this fire in the boiler-room of defendant be said to be well guarded and kept, unless some appliances were there for the purpose of speedily extinguishing accidental fires in such room? I think not. And if any means or appliances for such purpose were required, then they must be such as an ordinarily prudent man would have provided under like circumstances.

The nearest case to the present that I have been able to find is that of *Hauch v. Hernandez*, 41 La. Ann. 992. In that case fire was communicated from a porcelain factory to the saw-mill of plaintiff, destroying it. Held, that the owners of the factory were liable. The furnace and kiln of the factory were well constructed, of the best materials. The equipments for extinguishing fires were about the premises, though it was shown in the proofs that part of them were out of order. The court said that the defendants in the construction of their works seemed to have done all that was required and necessary for the protection of their own and their neighbors’ property. It was shown that there were partitions built of dry pine lumber not far from the walls of the kiln. It was also shown that the greatest care and watchfulness were required about the kiln from the time of ceasing the feeding of the fires, when the mouths of the furnace were closed, and the heat was at its intensity, until it was cooled. Upon the day of the fire, after the furnace doors were closed, the watchmen left the building. This was held to be negligence. The fire evidently originated from the heat of the kiln igniting the partition. The fire broke out in this wood-work, about ten feet

from the kiln, and was caused by the excessive heat from the kiln. It is said that it was the duty of the defendants to have the kiln and furnace guarded by experienced employees during this critical time of intense heat, but the proofs showed an abandonment of the premises by the watchmen, which was negligence.

If the abandonment of the premises by watchmen at the time was negligence, would it not also have been negligence if the watchmen had remained at their posts, but been provided with no means of extinguishing a fire which was likely to occur from the action of the heat upon this dry wood-work? So in the case of a saw-mill like the one operated by defendant in the case before us, where it is reasonably to be anticipated that fires may break out, ought there not to be some appliances to put them out? It is clear to me that to operate such a mill without any appliances, or any means at all, to extinguish fires would be negligence, as a matter of law. And if means are provided, they should be such as an ordinarily prudent man would use, having due regard to the safety of his own property and that of his neighbors, and considering the situation and surroundings of his mill. The court, therefore, did not err in refusing to direct a verdict for the defendant.

The plaintiff was permitted to show that the usual means employed in saw-mills at Au Sable was by using the water-works and keeping hose, and that in Springport and Greenbush they had a "pail brigade." This was error. The defendant's liability in any event could not be governed by the practice in other mills at other places, necessarily under different conditions and surroundings; nor would it, in my opinion, be competent to show how another mill, if situated exactly as this one was, was equipped and protected against fire. There is nothing so uncommon about the knowledge of the spread of fire, or the construction of a saw-mill like this one, as to warrant expert evidence as to what means an ordinarily prudent man would take to prevent the spreading of fire in such a mill to save his own property. The jury, upon being made acquainted with the construction of the saw-mill, its location and surroundings, were competent to judge of the proper appliances to be used by an ordinarily careful man in the extinguishment of accidental fires liable to occur in this boiler-room. What was done in this regard in other mills

was irrelevant, and could have no effect other than to mislead the jury and prejudice the defendant's case.

A witness was allowed to testify that, in the same month and year of this fire, at the mills in the city of Alpena, as a rule, the appliances for fire protection were a force-pump and hose, "and certainly barrels of water and pails would be needed." Witnesses were also permitted to give their opinions whether it would be safe to operate the engine-room of defendant's mill without having any appliances, "any hose or other appliance, except, possibly, a couple of pails, to put out fire." As before said, this was not a question for expert evidence or opinion of witnesses. It does not require any special or particular knowledge, beyond that presumably open to a jury in a lumbering country, to determine what means would be safe or ordinarily prudent to be used to put out fires in a boiler-room or mill like that of the defendant in this case. It is best to limit expert testimony to its proper uses, since it is not now held in the highest esteem; nor has it been found to be free from the infirmities and temptations that belong to human nature. And since a man's opinion cannot be met and tested, as could his testimony to the existence of a fact, expert evidence, while useful in many cases, is dangerous in all, and should be restricted, for the purpose of accuracy in determining the truth, which is the aim of all judicial investigation, to those cases where its use is wellnigh indispensable because of questions of science or skill being involved, in which a special and peculiar knowledge is desired, in order to arrive at the truth.

There was also error in permitting a witness to testify that one of the hangers in the boiler-room of this mill was charred by fire in 1884 or 1885. Such fact had no possible legitimate bearing upon the issue, and its admission in evidence was to defendant's prejudice. The judgment is reversed, and a new trial granted, with costs of this court to defendant.

Fires, Liability of Private Person for.*

General Principles. — The general rule is well settled that when a private owner of property sets out fire upon his own premises for a lawful purpose, or a fire accidentally starts thereon, he is not liable for the damage caused by

* REFERENCE TO MONOGRAPHIC NOTES.

Fire, common carrier, liability for loss occasioned by: 31 Am. Dec. 554-558.

Liability of railroad companies for: 33 Am. Dec. 70-72.

Loss by, what included within: 45 Am. Dec. 657-661.

Statutes authorizing destruction of property in case of: 47 Am. Dec. 622-623.

its communication to the property of another, unless it started through his negligence, or he failed to use ordinary skill and care in controlling or extinguishing it: *Sweeney v. Merrill*, 38 Kan. 216; 5 Am. St. Rep. 734; *Clark v. Foot*, 8 Johns. 421; *Bennett v. Scutt*, 18 Barb. 347; *Miller v. Martin*, 16 Mo. 508; 57 Am. Dec. 242; *Fahn v. Reichart*, 8 Wis. 255; 76 Am. Dec. 237; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Barb. 424; *Filliter v. Phippard*, 11 Q. B. 347.

Presumption as to Negligence. — The destruction of property by fire, either upon the premises where it starts or is kindled, or on other property to which it is communicated, does not raise a presumption of negligence, either in the kindling or management of the fire: *Catron v. Nichols*, 81 Mo. 80; 51 Am. Rep. 222; *Lansing v. Stone*, 37 Barb. 15; *Bryan v. Fowler*, 70 N. C. 596. In all such cases the burden of proof is upon the plaintiff to show that the damage was caused by the negligence of the party kindling the fire: *Sturgis v. Robbins*, 62 Me. 289; *Buchelder v. Heagan*, 18 Me. 32; *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373; 46 Am. Rep. 400; *Tourtellot v. Rosebrook*, 11 Met. 460; *Read v. Pennsylvania R. R. Co.*, 44 N. J. L. 280; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584. Whether there was negligence is a question of fact for the jury to determine: *Powers v. Craig*, 22 Neb. 621; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584; *Jordan v. Lassiter*, 6 Jones, 130; *Dewey v. Leonard*, 14 Minn. 153; *De France v. Spencer*, 2 G. Greene, 462; 52 Am. Dec. 533.

Illustrations. — Tested by the principles hereinbefore stated, it has been determined that when fire emanating from a fire-pit, used by the owner of a saw-mill for the purpose of burning his refuse, is communicated to another's property by a sudden shifting and increase in the violence of the wind, the mill-owner is not liable for the consequences, in the absence of proof that he did not take proper precautions to watch and guard the fire to prevent its escape, or that the wind was blowing with such violence as to render it imprudent to start the fire when it was kindled: *Polzen v. Morse*, 91 Mich. 206. Putting ashes in a wooden barrel, in violation of a city ordinance, is not negligence, as a matter of law, though the barrel, taking fire from the ashes, communicates with adjacent property and destroys it. In such case negligence is a question of fact: *Cook v. Johnston*, 58 Mich. 437; 55 Am. Rep. 703. But when a fire is started by a tenant by reason of his permitting a fire to be maintained in a barn, in a stove, the vent of which is by a stove-pipe passing through a hole in the barn roof, there is such negligence on the part of the tenant as will make him liable for the burning of the barn and surrounding buildings: *Dorr v. Harkness*, 49 N. J. L. 571; 60 Am. Rep. 656. When a person is engaged in thrashing grain with a steam-thrasher, he is liable for the value of stacks of grain burned by fire communicated from the thrasher, and resulting from continuing to run it without the consent of the owner of the grain, and in his absence, after an increase in the violence of the wind, would make it apparent to an ordinarily prudent man that there would be danger of firing the stacks of grain by continuing to thrash while the wind was so blowing: *Collins v. Groseclose*, 40 Ind. 414. A porcelain factory, or furnace of any kind requiring great heat in its operation, is dangerous to adjoining property, and requires a degree of care in its management proportionate to its danger; and it is negligence on the part of the owner of such a factory to leave his kiln unattended from the time he ceases feeding the fires, if the heat is very great, until the kiln cools, requiring from twelve to fifteen hours; and if, during this time, the factory takes fire from the kiln, and the factory in turn communicates the fire to an adjoining saw-mill, and destroys it, the owner of the

factory is liable in damages: *Hauch v. Hernandez*, 41 La. Ann. 992. When one negligently, but accidentally, sets his building on fire, and the fire, by force of a violent wind, is carried to the building of another, the party first setting the fire is not liable for the damage caused thereby to another. The wind, and not negligence, is the proximate cause of the damage: *Pennsylvania Co. v. Whitlock*, 99 Ind. 16; 50 Am. Rep. 71.

Clearing Land. — The general propositions of law above set forth have been universally applied to actions for damages, arising from the spread of fire kindled to clear land. The owner or occupant of land has an undeniable right to burn the fallow and wood thereon, in accordance with the custom of the country, for the purpose of bringing the land into cultivation. A fire kindled for this purpose is lawful, and the owner or occupant upon whose land it originates is not liable for the damages to another caused thereby, in the absence of some act or default, or some other circumstance making the act of starting the fire negligent in itself: *Garnier v. Porter*, 90 Cal. 105; *Miller v. Martin*, 16 Mo. 508; 57 Am. Rep. 242; *Clark v. Foot*, 8 Johns. 421; *Bennett v. Scutt*, 18 Barb. 347; *Fahn v. Reichart*, 8 Wis. 255; 76 Am. Dec. 237; *Russell v. Reagan*, 34 Mo. App. 242; *Kuhle v. Hobein*, 30 Mo. App. 472. When a private person sets fire to his fallow, wood, or timber for the purpose of bringing his land into cultivation, and the wind rises, causing the flames to spread, and communicate the fire to his neighbor's land, and the crops or other property of the latter are thereby destroyed, no action will lie without proof of negligence or misconduct on the part of the person building the fire. The mere fact that it was set in a dry time does not of itself establish negligence: *Stewart v. Hawley*, 22 Barb. 619; *Sweeney v. Merrill*, 38 Kan. 216; 5 Am. St. Rep. 734; *Averitt v. Murrell*, 4 Jones, 323. Nor does the fact that the person kindling the fire left home without leaving any one to watch the fire, and was absent when the adjoining property was burned, show negligence or carelessness on his part, if he had no reason to apprehend a sudden change in the weather and the rising of the wind at the time he left home: *Calkins v. Barger*, 44 Barb. 424. No presumption of negligence arises from the mere fact of the fire, and the burden of proof is always upon the plaintiff to show that there was negligence in kindling the fire, or want of due care in seeking to control its communication to adjoining property: *Sturgis v. Robbins*, 62 Me. 269; *Bachelder v. Heagan*, 18 Me. 32; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584.

Question of Negligence is for the Jury. — The question of negligence is one of fact for the jury to determine, and the proper subject of inquiry is, Did the person starting the fire use such care, caution, and diligence as a prudent and reasonable man would have exercised under the circumstances to prevent damage to others? *Dewey v. Leonard*, 14 Minn. 153; *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584. In *Catron v. Nichols*, 81 Mo. 80, 51 Am. Rep. 222, the court said: "A farmer has an undoubted right to set out a fire in order to prepare his land for cultivation, and if he does so with the requisite degree of care, and prudently manages the same after it is set out, he cannot be held liable for any accidental or unavoidable injury occasioned thereby; and the burden is on him who avers that such fire was negligently kindled or carelessly managed to prove such negligence or want of care."

One who purposely starts a fire upon his own premises, for the purpose of clearing it or fitting it for the plow, must certainly use ordinary care to confine it to his own land, and to prevent its spread to or upon the land of others, to their injury or damage: *Hanlon v. Ingram*, 1 Iowa, 108; *Hewey v. Nourse*, 54 Me. 266; *Dewey v. Leonard*, 14 Minn. 153; *Johnson v. Barber*, 5 Gilman.

425; 50 Am. Dec. 416; and although a person may burn the grass and stubble on his own land, he is not at liberty to do so, to the injury of his neighbor by spread of the fire, when, on account of the time, manner, or circumstances, it would appear probable to an ordinarily reasonable man, exercising due caution, that such danger to others might follow: *Dewey v. Leonard*, 14 Minn. 153. But if due diligence is used in firing the land, and, notwithstanding, on account of inevitable accident, the fire escapes, to the injury of an adjoining owner, the party setting the fire is not liable: *Miller v. Martin*, 16 Mo. 508; 57 Am. Dec. 242. Hence it is negligence to set fire to rubbish or brush on one's land while the wood cut off the land, and belonging to another person, is lawfully lying thereon, without giving the latter an opportunity to remove it: *Jordan v. Wyatt*, 4 Gratt. 151; 47 Am. Dec. 720. But it seems that after giving reasonable notice to the owner of the wood of an intention to burn the brush, and to remove the wood, the owner of the land may fire the brush thereon without being liable for any consequent injury to the wood still remaining: *Bennett v. Scutt*, 18 Barb. 347.

Instances of Liability. — Setting fire to a log-heap on a calm morning, in dry weather, within a few yards of a fence, and connected therewith by a dead pine tree and dry rubbish, by which the fire is communicated to adjoining property, is such negligence as will make the party setting the fire liable in damages to the adjoining owner: *Garrett v. Freeman*, 5 Jones, 78. So when a party makes a fire for a necessary purpose upon or near the grounds of another, but negligently leaves it with combustible material about it, and the fire spreads and destroys adjacent property, the party starting the fire is liable in damages: *Cleland v. Thornton*, 43 Cal. 437. When an owner of land sets fire to logs thereon in a particularly dry season, and the land is covered with other combustible matter, which, catching fire from the logs, communicates it to an adjoining woodland, such owner is negligent, and liable in damages, although the day before the fire was set there had been a heavy rain, which the indications of the weather showed might continue, but instead, it came off dry and hot, and a wind springing up, the fire so spread to the adjacent land, notwithstanding all due exertion to subdue it: *Hays v. Miller*, 70 N. Y. 112. When the party kindling the fire is negligent in setting it out, or in guarding it at any time before a violent wind communicates it to neighboring land, he is liable, although after the fire is so carried, it is beyond human control until the adjoining property is destroyed: *Hewey v. Nourse*, 54 Me. 256. In such case due diligence by back-firing, in an effort to save the adjacent property, will not relieve the party from the result of his negligence in starting the fire: *Sweeney v. Merrill*, 38 Kan. 216; 5 Am. St. Rep. 734. When the fire is negligently started, the fact that it was carried farther, and upon other property, by the springing up of a high and unusual wind will not break the continuity of the fire, so as to relieve the party starting it from liability: *Tyler v. Ricamore*, 87 Va. 466. A man who negligently sets fire on his own land, or negligently keeps it after it is kindled, is liable for any injury done by its spreading or communication to adjoining property, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated: *Higgins v. Dewey*, 107 Mass. 494; 9 Am. Rep. 63. So in cases where fire is negligently set, but is not immediately communicated to the property destroyed, but is communicated from one piece of property to another, until it reaches the property destroyed, causal connection will only cease when, between the negligence and the damage, an object is interposed which would have prevented the injury if due

care had been taken. Hence, when a fire originates in carelessness of the party kindling it, and is carried directly by a material force, whether wind, the law of gravitation, combustible matter existing in a state of nature, or a running stream, to the adjoining property, and destroys it, the party starting the fire is answerable for the loss: *Kuhn v. Jewitt*, 32 N. J. Eq. 647; *Krippner v. Biebl*, 28 Minn. 139. If, in any case, negligence on the part of the party setting the fire is shown, the adjoining owner is entitled to recover all damages sustained thereby, and no more, whether the negligence be gross or only ordinary: *Barnard v. Poor*, 21 Pick. 378. In actions to recover for damages to adjoining property, arising from the spread of fire negligently kindled by one on his own land, the opinion of persons experienced in clearing land by fire, that there was no probability that a fire set out under the circumstances as described by the witnesses would have spread to the adjoining land, is inadmissible, for the reason that the subject does not call for expert evidence, and is within the common knowledge of the jury: *Higgins v. Dewey*, 107 Mass. 496; 9 Am. Rep. 63; *Ferguson v. Hubbell*, 97 N. Y. 507; 49 Am. Rep. 544.

Kindling Fire upon Land of Another. — One who negligently sets fire to land which does not belong to him is liable for all the proximate consequences of his wrongful act, both to owner of the land upon which the fire is started, or to the owner of property upon that land, and also to the owner of any other property to which the fire may spread. Hence, when a party makes a fire for a necessary purpose, as for a camp fire, upon or near the land of another, but negligently leaves it surrounded by combustible material, and it spreads to adjacent property, the party building the fire is liable for all damages caused by it: *Cleland v. Thornton*, 43 Cal. 437; *Bimell v. Booker*, 16 Ark. 308. In such case, negligence on the part of the builder of the fire seems to be presumed, and the burden to disprove it is upon him, in order to relieve himself from liability.

Statutory Liability. — The liability of a person for kindling a fire upon his own land or the land of another is fixed by statute in some of the states. Thus the Connecticut statute providing that "every person who shall set fire to any land, that shall run upon the land of any other person, shall pay to the owner all the damages done by such fire," contemplates a case where fire is set on the land of one person, and from there runs upon the land of another, and not where the fire is set upon the land injured: *Grannis v. Cummings*, 25 Conn. 165. But it is not necessary that the fire should run along the ground in a continuous or traceable course upon another's land, but its spreading there in any ordinary mode, through natural causes, is within the statute: *Ayer v. Starkey*, 30 Conn. 304. When a person is authorized by statute, as in Illinois, to fire a prairie at certain times, he is bound, even when acting within the provisions of the statute, to use every precaution in reason to prevent injury to others; and in actions to recover for injury done by such fire the plaintiff need only show that defendant set the fire that caused it, and the burden of proof is then on the defendant to show excuse or justification for setting the fire: *Johnson v. Barber*, 5 Gilm. 425; 50 Am. Dec. 416; *Burton v. McClellan*, 2 Scam. 434. So in Iowa, a person setting fire to a prairie at any time, except between the 1st of May and the 1st of September in each year, is absolutely liable for damages caused by its escape onto the premises of another, regardless of the question of diligence used to control it: *Conn v. May*, 36 Iowa, 241; *Thoburn v. Campbell*, 80 Iowa, 838. But the kindling of a fire in a cultivated field is not within the meaning of such statute: *Brunell v. Hopkins*, 42 Iowa, 429. So under the Kansas

statute, one who intentionally and directly sets a prairie on fire is absolutely liable for the damages sustained by neighboring property: *Hunt v. Haines*, 25 Kan. 210. In Missouri, a person who sets fire around his farm, whether it is inclosed or not, does so at his own peril, and if it spreads and causes damage to another, he is liable under the statute, no matter what may have been his motive: *Finley v. Langston*, 12 Mo. 120. In North Carolina, one intending to fire his woods must give written notice of his intention to his neighbors, as provided by statute; and in an action for damages under the statute for willfully firing defendant's woods, by which plaintiff's woods were burnt, the setting the fire without notice is the ground of the action, and by a waiver of such notice the plaintiff will lose his cause of action: *Lamb v. Sloan*, 94 N. C. 534; *Robertson v. Kirby*, 7 Jones, 477. And if the firing of the woods is necessary for the protection of property, no cause of action for damages arises under the statute. But when it is admitted that the woods were fired without giving the statutory notice, and without absolute necessity for protection to property, the presumption arises that the fire was set willfully, and the defendant will not be allowed to show that he used reasonable care in setting the fire, and reasonable diligence to prevent it from spreading to adjoining lands: *Lamb v. Sloan*, 94 N. C. 534.

Fire to Produce Motive Power. — A person engaged in manufacturing, or who employs fire for the purpose of generating steam as a propelling power, or for any other purpose, under circumstances which make it especially dangerous to others, is bound to use at least such ordinary care and skill as a reasonable, prudent man would exercise under the circumstances to prevent fire upon his own premises, and to prevent it from spreading to the property of others in case it accidentally starts on the premises where it is first used for generating steam. A failure to exercise such care is negligence, and creates liability for injury to or destruction of neighboring property caused thereby. Negligence is not presumed from the mere fact of the escape of fire, but must be proved, and what constitutes negligence is a question of fact for the jury to decide under the circumstances of each particular case: *Hoyt v. Jeffers*, 30 Mich. 181; *Read v. Morse*, 34 Wis. 315; *Atkinson v. Goodrich Transportation Co.*, 60 Wis. 141; 60 Am. Rep. 352; *Gagg v. Vetter*, 41 Ind. 228; 13 Am. Rep. 322; *Adams v. Young*, 44 Ohio St. 80; 58 Am. Rep. 789; *Hanch v. Hernandez*, 41 La. Ann. 992; *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373; 36 Am. Rep. 400. A person who, in generating steam by means of fire, also uses chimneys or smoke-stacks to convey the smoke, sparks, and cinders away from the fire must also exercise a high degree of care in providing the latest and best appliances in general use to prevent the conveyance of fire by means of sparks or cinders to other property; otherwise he is guilty of negligence, and must respond in damages: *Lawton v. Giles*, 90 N. C. 374; *Hinds v. Barton*, 25 N. Y. 544. A failure to use any spark-arrester on such stove-pipe or chimney is negligence which will render the owner liable for any damage to surrounding property caused thereby: *Teall v. Barton*, 40 Barb. 137; or if the spark-catcher used is defective, the owner is so liable: *Alpern v. Churchill*, 53 Mich. 607; *Mouat Lumber Co. v. Wilmore*, 15 Col. 136. The owner is bound, in adopting appliances and methods to check the flow of sparks, not only to adopt means calculated to avert the danger, but all methods and appliances which, in the progress of science and improvement, have been shown by experience to be the best, and which are in general use: *Hoyt v. Jeffers*, 30 Mich. 181; *Read v. Morse*, 34 Wis. 315. In one case, at least, it has been decided that the burden of showing due care and diligence

and the use of improved appliances to prevent the spread of fire is upon the defendant: *Lawton v. Giles*, 90 N. O. 374.

Damages, What Recoverable. — One who negligently allows a fire to start and spread is liable for all damages of which his negligence is the proximate cause. Thus where the communication of fire to the property of another is due to negligence in allowing it to start or escape, and the burning of such property carries the fire to the property of another, and the burning of the latter causes the burning of still other property, and so on, the party first guilty of negligence is liable for all damage done, in the absence of some intervening cause which spreads the fire, or the negligence of some third person in failing to stop its progress; and the remoteness of the property so burned from the place where the fire had its origin has nothing to do with the liability of the negligent party: *Hoyt v. Jeffers*, 30 Mich. 181; *Adams v. Young*, 44 Ohio St. 80; 58 Am. Rep. 789. Whether negligence on the part of the person first allowing the fire to escape is the proximate cause of all the resulting damage or not is a question of fact for the jury to determine: *Adams v. Young*, 44 Ohio St. 80; 58 Am. Rep. 789.

Bailee not Liable for Fire. — A bailee for hire, either as a warehouseman or otherwise, is only required to exercise ordinary care and diligence in respect to the property in his possession; and if it is destroyed by fire without his fault or negligence, he cannot be held liable for its loss: *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586; *Vincent v. Rather*, 31 Tex. 77; 98 Am. Dec. 516; *Hyland v. Paul*, 33 Barb. 241; *Hatchett v. Gibson*, 13 Ala. 587; 24 Ala. 201; *Irons v. Kentner*, 51 Iowa, 88; 33 Am. Rep. 119; *Jones v. Hatchett*, 14 Ala. 743; *Macklin v. Frazier*, 9 Bush, 3; *Francis v. Castleman*, 4 Bibb, 282; *Russell v. Kochler*, 66 Ill. 459. The mere fact that goods are destroyed by fire while in the custody of a bailee for hire does not of itself afford any presumption of negligence: *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586.

NOBLE v. MURPHY.

[91 MICHIGAN, 663.]

SURETYSHIP — APPLICATION OF SECURITY. — When a creditor, holding several notes against his debtor, with notice that one of them is signed by a surety, takes a mortgage from the debtor as security for all the notes, without any designation as to the application of the proceeds of the security, he has a right to apply such proceeds in payment of the notes other than the one secured by the contract of suretyship, and greatly exceeding in amount the value of the security; and if, before the maturity of the mortgage, and after accepting a deed to the land upon which it is given, the creditor sells the land, and so applies the proceeds, the surety is not thereby damaged, and remains liable on the note signed by him as surety.

SURETYSHIP — RELEASE OF SURETY — RIGHT TO SUBROGATION. — When the contract between the surety and the creditor provides for the retention of securities received either from the surety or the principal debtor, a departure from the terms of such contract releases the surety, whether to his detriment or not; but when the surety's right depends upon the

doctrine of subrogation, and when the security is not received under any contract to which the surety is a party, the release of a lien upon property by which it is rendered unavailing to the payment of the debt, furnishes a defense to the surety only to the extent of the value of the lien thus lost.

William Gowan, and Atkinson and Vance, for the appellants.

Avery Brothers and Walsh, for the respondent.

MONTGOMERY, J. This action was brought to recover the amount due on a promissory note, purporting to be signed by defendant, and payable to the order of one George Van Wagner. The note bore date June 11, 1885, was due seven months from date, and was given for \$118, with interest.

The defendant denied the execution of the note under oath, and offered testimony tending to show that he had given a note for eighteen dollars to Van Wagner, and that this note was given for Van Wagner's accommodation, and that the plaintiff had notice that the note which he had in fact given to Van Wagner was signed for his accommodation, and that the defendant was a surety. The plaintiffs did not deny knowledge of the fact that the defendant was a surety of Van Wagner, but did offer testimony tending to show that the note in suit was not a forgery, but was executed by defendant. The plaintiffs also had other notes, signed by different parties, and indorsed by Van Wagner, in all amounting to \$2,586.96.

On October 5, 1885, Mrs. Van Wagner, wife of George Van Wagner, executed a mortgage upon real estate belonging to her, to secure these notes, which mortgage was to become due one year from its date. Among the notes so secured was the one now in suit.

On November 12, 1885, Mrs. Van Wagner executed to plaintiff Noble a deed of the same property. The evidence as to the consideration for this deed is conflicting. Mrs. Van Wagner claims that the consideration was notes amounting to nine hundred dollars, which her husband had discounted with the plaintiffs, and also the note in suit, which she says they agreed to send her on the execution of the deed. The plaintiffs, on the other hand, claim that they agreed to give her nine hundred dollars in notes, which she herself had discounted at the bank, and that they refused to give up the Murphy note. Plaintiffs subsequently sold the land, realizing thereon only about three hundred dollars, which was the full value of the

interest covered by the mortgage and conveyed to them by the deed.

The court directed a verdict for the defendant, and plaintiffs bring error.

It will be seen that the two questions, — 1. Whether the note was the note of the defendant; and 2. Whether, by the arrangement with Mrs. Van Wagner, the note was paid, — were disputed questions of fact; and if, upon the finding of these facts as the testimony of the plaintiffs would have warranted, they would have been entitled to recover, the case should have been sent to the jury. The defendant claimed, however, that, according to the testimony of the plaintiffs, the defendant was discharged.

According to the plaintiffs' testimony, the mortgage was taken as collateral security for all the notes held by plaintiffs, including Murphy's. It is well settled that where a creditor receives moneys from his debtor he may apply the same upon any one of the debts which he may select. The theory of the plaintiffs is, that the security was given to cover all the notes in their hands, and that they subsequently, with the consent of the parties giving the security, applied the amount realized upon the security to the payment of other notes than that now in suit. This they would have the clear right to do, unless the surety acquired such a right in the security the moment it was given as precluded the plaintiffs from dealing with the same in the manner in which they did: *Blair v. Carpenter*, 75 Mich. 167; *Shelden v. Bennett*, 44 Mich. 634; *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597. But it is equally clear that the plaintiffs, receiving the security in the manner in which they did, without any designation from the debtor of a particular note upon which the proceeds of the security should be applied, had the right to apply the entire proceeds upon notes other than that upon which the defendant was surety: *Gaston v. Barney*, 11 Ohio St. 506; *Hanson v. Manley*, 72 Iowa, 50; *Mathews v. Switzler*, 46 Mo. 301; *Northern Nat. Bank v. Lewis*, 78 Wis. 475. The language of the court in *Gaston v. Barney*, 11 Ohio St. 506, applies to the facts of this case: "The surety was no party to this arrangement, and had no right to control its terms. His principals were dealing, not with his property, but their own. The claims received by the creditor became, in his hands, a collateral security for the payment of the notes generally; and the surety has no right to ask that the creditor shall not

be allowed the full benefit of his own vigilance": *Wood v. Callaghan*, 61 Mich. 403; 1 Am. St. Rep. 597.

But it is contended that by accepting a deed of these premises, and converting the property into money, the plaintiffs cut off the surety's right to subrogation. This right to subrogation is not one depending upon the contract, but upon equitable principles. In any case, where the contract between the surety and the creditor provides for the retention of securities received either from the surety or the principal debtor, undoubtedly a departure from the terms of such contract would release the surety, whether shown to be to his detriment or not; but where the surety's right, as in this case, depends upon the doctrine of subrogation, and where the security is received not under any contract to which the surety is a party, the rule is well settled that the release of a lien upon property by which it is rendered unavailing to the payment of the debt furnishes a defense to the surety only to the extent of the value of the lien thus lost: *Brandt on Suretyship*, secs. 370, 373, 375, and cases cited; *Colebroke on Collateral Securities*, sec. 239. As in this case the plaintiffs had the right to apply the proceeds of the mortgage received by them to the extinguishment of the debts represented by notes other than that signed by defendant, amounting to many times the value of the security, it follows that the defendant could not have been damnified by the plaintiffs' appropriation of the mortgaged property.

The judgment should be reversed, and a new trial ordered.

SURETYSHIP — CONSTRUCTION OF CONTRACT OF — SURETY, WHEN DISCHARGED. — When a creditor enters into any valid contract with the principal debtor, without the assent of the surety, whereby the liability of the surety is injuriously affected, such contract discharges the surety: *Scott v. Fisher*, 110 N. C. 311; 28 Am. St. Rep. 688, and extended note, in which the cases discussing what variation from the terms of the contract of suretyship will discharge the surety are collected. Every surety has a right to stand upon the strict terms of his obligation, and his liability is not to be extended by implication: *Shreffler v. Nailthoffer*, 133 Ill. 536; 23 Am. St. Rep. 626, and note; note to *Price v. Dime Sav. Bank*, 7 Am. St. Rep. 372. Where one signs a negotiable instrument, perfect on its face, as surety for another, upon a condition known only to the maker, who is thereby made the agent of the surety, the surety will be liable, even if such condition is not complied with, unless notice of the condition is given to the payee: *Fowler v. Allen*, 22 S. C. 229.

SURETYSHIP — APPLICATION OF PAYMENTS. — The holder of several unpaid notes, some secured and others unsecured, may, in the absence of any agreement or direction as to the application of payment, apply the money exclu-

sively to the payment of any one of the notes, and is not bound to a *pro rata* application of it: *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597, and note. Where a creditor holds several demands against the principal debtor, under all of which attachments have been issued and levied, he has no right to insist that the creditor shall first apply the proceeds of the attachment to the satisfaction of the demand secured by the indorsement: *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253; 23 Am. St. Rep. 39, and note. See note to *Frazier v. Lanahan*, 17 Am. St. Rep. 518. See *San Antonio Nat. Bank v. Blocker*, 77 Tex. 73, in which it was held that collateral security given for one debt of a partnership after the debt has been paid cannot be retained to secure another debt due from one of the partners as principal and the other partner as security.

PORTSMOUTH SAV. BANK v. VILLAGE OF ASHLEY.

[91 MICHIGAN, 670.]

MUNICIPAL BONDS—ISSUANCE—VALIDITY.—When the power to issue water-works bonds is vested in a village council, such bonds are not binding upon the village until its council has met at a legal meeting and voted to issue the bonds, or authorized their issue.

MUNICIPAL BONDS—ISSUANCE—VALIDITY.—When the power to issue water-works bonds is vested in a city council, a resolution of such council authorizing its president and clerk to sign such bonds confers no authority upon such officers to issue and dispose of the bonds after signing them.

MUNICIPAL BONDS—DEFENSES AGAINST.—Purchaser of municipal water-works bonds is bound to take notice of the law under which they are issued, and of the records of the city issuing them, and when such records disclose that they were not issued in compliance with law, the purchaser takes them at his peril, and they are not binding against the city.

George P. Stone and A. W. Scott, for the appellant.

T. W. Whitney, Wiener and Draper, and Kelly S. Searl, for the respondent.

LONG, J. This is an action brought to recover the amount of interest due upon a series of municipal coupon bonds, alleged to have been executed and issued by the defendant. The suit was commenced by declaration, in which were set forth copies of the bonds and coupons upon which recovery is sought. Under the plea of the general issue, the defendant gave notice that it would show on the trial that if said bonds and coupons were signed and sealed by the defendant's lawful agents, they were so signed and sealed collusively and fraudulently by said agents and one Robinson, a representative agent of the Toledo, Saginaw, and Muskegon Railway Company; and that the defendant would insist that said

bonds and coupons were never, by authority of any vote of the constituted authorities of said defendant, delivered or transferred to any person upon valid, valuable, or good consideration, but that the said bonds and coupons were delivered without warrant or authority to the aforesaid agent of said railway company by the fraud and collusion of defendant's agents and said Robinson.

The defendant, after the issue made as aforesaid, and after one trial had been had, and on March 21, 1890, by permission of this court (*Portsmouth Sav. Bank v. Hart*, 83 Mich. 646), filed an affidavit in the cause, denying under oath the execution of the bonds and coupons in suit.

The cause was tried before the court without a jury, and the court made the following findings of fact and law:—

“1. That on the eighteenth day of November, 1886, a committee of the common council of the village of Ashley reported to the council that the probable cost of water-works would be about nine thousand dollars; that on the eighteenth day of November, 1886, a resolution was passed by the common council, calling a special meeting of the legal, qualified voters of the village, to be held on the twenty-ninth day of November, 1886, at the depot in the village, for the purpose of voting upon the question of bonding the village to the amount of eight thousand five hundred dollars for water-works. The resolution recited that the said bonds should be issued as follows: Seventeen bonds, of five hundred dollars each, payable, first bond, January 1, 1892, and one bond annually thereafter, with interest at six per cent annually on the whole amount unpaid. The said resolution further directed the clerk to give notice of the time and place for the registration of voters as provided by statute. The notice of such special election was given by the clerk of the village by posting notices of the same, showing the purpose for which it was called, in three public places in said village. Said notices were so posted on the eighteenth day of November, 1886.

“2. That pursuant to said notice, a special election was held on the twenty-ninth day of November, 1886, and at such meeting the question of bonding the village for water-works, as set forth in the notice for the same, was voted on, and resulted in seventy-two votes for the proposition and one against.

“3. That afterwards the common council passed a resolution that the president and clerk sign up the bonds so authorized.

"4. No other authority was given, and there is no record that there was any one authorized to dispose of the bonds to any person. While the ostensible purpose of this action was to build a system of water-works, it was understood by the village council, and generally by the people of the village, that the real object was to give the bonds to the railroad company that was then proposing to build a road from Muskegon to Ashley, as a *bonus* for building the road. But there is nothing in the public records of the village which discloses that the bonds were issued for any other purpose excepting for water-works.

"5. That pursuant to the said action of the council, a set of bonds aggregating the sum of eight thousand five hundred dollars (in accordance with the vote and action of the council) were prepared, there being seventeen of the bonds, of five hundred dollars each, a copy of which is as follows:—

"No. —.

\$500.

"STATE OF MICHIGAN.

"Village of Ashley.

County of Gratiot.

"The village of Ashley, in the county of Gratiot and state of Michigan, hereby acknowledges itself indebted in the sum of five hundred dollars, lawful money of the United States of America, bearing interest at the rate of six per cent per annum from the date hereof, payable annually, and said sum of money the said village of Ashley promises to pay to the holder thereof on the — day of —, A. D. 18—, the interest aforesaid to be paid annually, according to the interest coupons hereto attached, and both principal and interest payable at the treasurer's office of the village of Ashley.

"This bond is issued in pursuance of the statutes of the state of Michigan and a resolution of the trustees of the village of Ashley, and was authorized by a legal vote of the qualified voters of said village, at a meeting held November 29, A. D. 1886.

"In testimony whereof, we, the undersigned officers of the village, being authorized to execute this obligation in its behalf, have hereunto set our signatures this first day of December, A. D. 1886.

"—, President.

"—, Clerk.'

"6. That in pursuance and by virtue of the authority granted by the common council or board of trustees, the president and clerk proceeded to sign the full number and amount of said bonds (seventeen), and they were then by the president, in pursuance of the understanding hereinbefore mentioned, sent

to a bank at Toledo, Ohio, and there deposited to the order of the said president of the village, his understanding being that the said bonds should be turned over to the said railroad company, whenever the same was completed, to the said village of Ashley.

"7. That after the bonds were so deposited, the president of the said railroad made efforts to negotiate the same, but, claiming that owing to the cheap appearance of the bonds, and the fact that they were payable at the treasurer's office of the village, his efforts were unsuccessful, thereupon he procured a new set of bonds to be prepared, and sent or personally delivered them to the president of the village, with a request that they be signed and substituted for the first set; and thereupon the president of the village and one O. E. Gibson, who was the village clerk at the time the first set of bonds were executed, but whose term of office had then expired, and who had removed from the village of Ashley, and whose successor had been elected and duly qualified, executed the new set of bonds, without the direction or knowledge of the village council.

"8. That after the bonds were so executed, the president of the village took them, and on the following day, which was March 28, 1887 (they having been signed and sealed on Sunday), left them with the express company in Ashley, to be sent to the Toledo Trust and Loan Company, of Toledo, Ohio, there to be held subject to the order of the village, it being the understanding of the village president that the bonds were to be delivered to the railroad president upon the completion of said railroad to Ashley.

"9. Said bonds were in the possession of Robinson, the president of the railroad, on March 30, 1887; but there is no evidence as to how they came to his possession, nor is there any evidence showing what was done with the bonds by the express company after they were delivered to it at Ashley.

"10. That the railroad had not been completed to the village of Ashley, aforesaid, at the time the said railroad president procured the second set of bonds.

"11. No action was ever taken by the village council or trustees authorizing the execution of the latter set of bonds, and the same was done by a secret agreement between the said Robinson and the president of the village, acting as above stated, and without the knowledge of the village council.

"12. At the time the said second set of bonds were so executed, the first set of bonds were still in existence, and still in

said bank, subject to the order of the president of the said village; but were deposited there for the purpose and with the intent heretofore stated.

"18. After the second set of bonds had been signed and had come into Robinson's hands, as above stated, the president of the village had the bonds first issued returned to the village of Ashley, and they were taken by him and one of the trustees, and secretly burned. The bonds were procured and destroyed by the president, as above stated, after April 1, 1887. The following are copies of bond No. 1 and coupon No. 1 of the series upon which this suit is brought, and the balance of the bonds and coupons in suit are in the same words and figures as those here shown, excepting as to the numbers of the same and the dates and times of payment: —

"No. 1.

\$500.00.

"THE UNITED STATES OF AMERICA.

"State of Michigan, County of Gratiot, Village of Ashley.

"Water-works Bond.

"Know all men by these presents, that the village of Ashley, Gratiot County, state of Michigan, is indebted to and promises to pay to the bearer the sum of five hundred dollars, in lawful money of the United States of America, at the Wayne County Savings Bank, in the city of Detroit, Michigan, on the first day of January, A. D. 1892, with interest thereon at the rate of six per cent per annum, payable annually on the first day of January of each year, upon the presentation and delivery of the proper coupon hereto annexed, signed by the president and clerk of said village, at said Wayne County Savings Bank, in the city of Detroit, for the payment of which sum and interest the said village is hereby held and firmly bound, and its faith and credit are hereby pledged.

"This bond is one of seventeen bonds, amounting in the aggregate to eight thousand five hundred dollars, issued by the village of Ashley, Michigan, for the purpose of building water-works, under authority conferred by the laws of the state of Michigan, and was duly authorized by a majority of the legal voters of said village at an election held November 29, 1886. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law.

"In testimony whereof, we, the undersigned officers of the

village of Ashley, being duly authorized to execute this obligation on its behalf, have hereunto set our signatures, and caused the seal of said village to be hereunto affixed, this first day of December, 1886. “Wm. A. CHITTENDEN, President.

[SEAL]

“O. E. GIBSON, Clerk.’

“Coupon No. 1.

\$30.00.

“January 1, 1888, the village of Ashley, county of Gratiot, and state of Michigan, will pay to the bearer thirty dollars at the Wayne County Savings Bank, in Detroit, Michigan, being the interest due that day on bond No. 1, issued December 1, 1886.

“Wm. A. CHITTENDEN, President.

“O. E. GIBSON, Clerk.’

“14. That the plaintiff is the *bona fide* owner and holder of said bonds, having purchased the same in the open market, in good faith, for value, without notice of the object and purpose of their issue, or of the acts of the officers of the village, except as is shown by the public records of said village and the recitals on the face of the bonds.

“15. That at the time of the commencement of this suit there was due and unpaid on said bonds the sum of \$510, with interest thereon at six per cent per annum from January 1, 1888.

“16. I find, as conclusions of law, that the said bonds were issued without authority of law.

“16 a. I find that no person or officer was ever authorized to sign or issue the bonds upon which this action is based.

“16 b. I find that the president of the village had no authority to deliver or in any manner dispose of either the first or second set of bonds.

“17. I find that the officers, at the time they signed the same, were acting without the authority of the village, and without authority of law, and that the said bonds are absolutely void, and that the plaintiff cannot recover.

“Judgment for the defendant is hereby ordered.

“S. B. DABOLL, Circuit Judge.”

Judgment was rendered upon said findings in favor of defendant on September 2, 1891.

After these findings were filed in the cause, plaintiff's counsel requested the court to find further, as follows: “1. That the name of O. E. Gibson was put upon the bonds in question because it was deemed necessary that the names should appear as they were on the first set, and that they should cor-

respond with the officers' names as they were at the time the first set were made. 2. That at the time the bonds in suit were made, signed, and sealed, the said O. E. Gibson had possession of the seal of said village, and was acting as clerk of said village, at the request of the village officers."

The plaintiff also excepted specifically to certain of the findings made as follows: "1. To so much of the seventh finding of the court as finds that at the time the bonds in suit were executed the successor of O. E. Gibson had been elected and duly qualified, and that said bonds were executed without the direction or knowledge of the village council, as not being supported by the testimony. 2. To so much of the eighth finding of the court as finds that the bonds in suit were left with the express company in Ashley, to be sent to the Toledo Trust and Loan Company, as not being supported by the testimony. 3. To the finding of the court that the said bonds were issued without authority of law. 4. To the finding of the court that no person or officer was ever authorized to sign or issue the bonds on which this action is brought. 5. To the finding of the court that the president of the village had no authority to deliver or in any manner dispose of either the first or second set of bonds. 6. To the finding of the court that the officers, at the time they signed the same, were acting without the authority of the village, and without authority of law, and that the said bonds are absolutely void."

The requests for further findings and the exceptions to the findings made constitute the claimed errors, which have been fully argued in this court.

The several exceptions taken to the refusal of the court below to make other and additional findings of fact and law, and the exceptions to the seventh and eighth findings made by the court, need not be considered, as we think the plaintiff's case must stand or fall upon one question, and that is, whether the president of the village had authority to deliver the bonds in controversy, or the right in any manner to dispose of them.

The findings made by the court below are supported by the testimony returned that while the ostensible purpose of issuing these bonds by the village was to build a system of water-works, yet it was understood by the people of the village and its officers that the real object was to give the bonds as a *bonus* to the railroad company that was then purposing to build a road from Muskegon to Ashley. This was well under-

stood by the village officers to be unlawful, and that bonds so issued would be void upon their face. The effort was made by the people of the village and the officers in the call for the election by which the bonds were to be voted, and in the proceedings by the village trustees, to cover up the real purpose for the issuing of the bonds, and the records from beginning to end disclose a lawful purpose for which they were to be issued, — that is, the construction of the water-works, — so that parties purchasing would have no means of ascertaining from the records the real object of the issue. These first bonds recited that they were made payable at the treasurer's office of the village of Ashley, and that they were issued in pursuance of the statutes of the state of Michigan and a resolution of the trustees of the village of Ashley, and were authorized by the legal vote of the qualified voters of said village at a meeting held November 29, 1886. The first issue was destroyed by the president of the village, but by whose authority does not appear. Mr. Chittenden was president, and in his testimony says that the bonds were destroyed and new ones issued for the reason that the first set was made payable at the office of the village treasurer, and they could be better disposed of if made payable at a bank, and that the second issue was made payable at the Wayne County Savings Bank, in the city of Detroit. The second issue of the bonds was signed by the president and clerk of the village some time in March, 1887, after the term of office of the village clerk had expired, and his successor had been elected. The bonds were dated back to the date of the first issue, but contained different recitals than the other bonds, both as to place of payment and the fact that all acts and things necessary to be done had been done and performed as required by law. These second bonds, upon their face, were regular, and, if the recitals were true, were of valid issue; but there is nothing upon this second set to show that the president and clerk of the village ever had authority to sign them, or to deliver any of them for any purpose whatever.

The village records were put in evidence, from which it appears that a resolution was passed December 1, 1886, as follows: —

“Resolved, by the common council of the village of Ashley, now in session, that the president and clerk be authorized to sign the bonds of the village for water-works; said bonds those voted for by the councilmen at the meeting held Novem-

ber 18, 1886, also by the legal voters at the special election held November 29, 1886."

This is the last resolution passed by the council in reference to these bonds; and it nowhere appears from the records of the village that any authority was ever conferred upon the president and clerk to deliver the bonds to any person or for any purpose whatever, or to issue new bonds in place of those destroyed. The mere signing of the bonds did not bind the village to the payment of them. They were still incomplete, and remained in the hands of the village, subject to the direction and control of the council. The village council was the only power, under the statutes, which had authority to direct the issue or delivery for the purposes for which the bonds were executed. No direction whatever was given by it to deliver the bonds, and until authority was given by the council, the president had no more power to dispose of them than a stranger to the proceedings; and a disposition of them by the president would not confer upon the holder any greater right to enforce payment than though they were stolen from the village treasury. The public can act only through authorized agents, and it is not bound until all who are required to participate in what is to be done have performed their respective duties: *Brown v. Bon Homme Co.*, S. D., July 8, 1890; 46 N. W. Rep. 173.

In *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497, this court laid down the doctrine that there can be no such thing as an innocent purchaser of negotiable paper which never had an inception by delivery. It was said: "As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intent of the parties."

The supreme court of Wisconsin followed the above rule in the case of *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1; and it was there said, citing from Chief Justice Dixon, in *Walker v. Ebert*, 29 Wis. 197, 9 Am. Rep. 548: "The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity, and without notice. It challenges the origin or existence of the paper itself, and the proposition is to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial

be allowed the full benefit of his own vigilance": *Wood v. Callaghan*, 61 Mich. 403; 1 Am. St. Rep. 597.

But it is contended that by accepting a deed of these premises, and converting the property into money, the plaintiffs cut off the surety's right to subrogation. This right to subrogation is not one depending upon the contract, but upon equitable principles. In any case, where the contract between the surety and the creditor provides for the retention of securities received either from the surety or the principal debtor, undoubtedly a departure from the terms of such contract would release the surety, whether shown to be to his detriment or not; but where the surety's right, as in this case, depends upon the doctrine of subrogation, and where the security is received not under any contract to which the surety is a party, the rule is well settled that the release of a lien upon property by which it is rendered unavailing to the payment of the debt furnishes a defense to the surety only to the extent of the value of the lien thus lost: *Brandt on Suretyship*, secs. 370, 373, 375, and cases cited; *Colebroke on Collateral Securities*, sec. 239. As in this case the plaintiffs had the right to apply the proceeds of the mortgage received by them to the extinguishment of the debts represented by notes other than that signed by defendant, amounting to many times the value of the security, it follows that the defendant could not have been damnified by the plaintiffs' appropriation of the mortgaged property.

The judgment should be reversed, and a new trial ordered.

SURETYSHIP — CONSTRUCTION OF CONTRACT OF — SURETY, WHEN DISCHARGED. — When a creditor enters into any valid contract with the principal debtor, without the assent of the surety, whereby the liability of the surety is injuriously affected, such contract discharges the surety: *Scott v. Fisher*, 110 N. O. 311; 28 Am. St. Rep. 688, and extended note, in which the cases discussing what variation from the terms of the contract of suretyship will discharge the surety are collected. Every surety has a right to stand upon the strict terms of his obligation, and his liability is not to be extended by implication: *Shreffler v. Natelthoffer*, 133 Ill. 536; 23 Am. St. Rep. 626, and note; note to *Price v. Dime Sav. Bank*, 7 Am. St. Rep. 372. Where one signs a negotiable instrument, perfect on its face, as surety for another, upon a condition known only to the maker, who is thereby made the agent of the surety, the surety will be liable, even if such condition is not complied with, unless notice of the condition is given to the payee: *Fowler v. Allen*, 32 S. C. 229.

SURETYSHIP — APPLICATION OF PAYMENTS. — The holder of several unpaid notes, some secured and others unsecured, may, in the absence of any agreement or direction as to the application of payment, apply the money exclu-

sively to the payment of any one of the notes, and is not bound to a *pro rata* application of it: *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597, and note. Where a creditor holds several demands against the principal debtor, under all of which attachments have been issued and levied, he has no right to insist that the creditor shall first apply the proceeds of the attachment to the satisfaction of the demand secured by the indorsement: *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253; 23 Am. St. Rep. 39, and note. See note to *Frazier v. Lanahan*, 17 Am. St. Rep. 518. See *San Antonio Nat. Bank v. Blocker*, 77 Tex. 73, in which it was held that collateral security given for one debt of a partnership after the debt has been paid cannot be retained to secure another debt due from one of the partners as principal and the other partner as security.

PORTSMOUTH SAV. BANK v. VILLAGE OF ASHLEY.

[91 MICHIGAN, 670.]

MUNICIPAL BONDS—ISSUANCE—VALIDITY.—When the power to issue water-works bonds is vested in a village council, such bonds are not binding upon the village until its council has met at a legal meeting and voted to issue the bonds, or authorized their issue.

MUNICIPAL BONDS—ISSUANCE—VALIDITY.—When the power to issue water-works bonds is vested in a city council, a resolution of such council authorizing its president and clerk to sign such bonds confers no authority upon such officers to issue and dispose of the bonds after signing them.

MUNICIPAL BONDS—DEFENSES AGAINST.—Purchaser of municipal water-works bonds is bound to take notice of the law under which they are issued, and of the records of the city issuing them, and when such records disclose that they were not issued in compliance with law, the purchaser takes them at his peril, and they are not binding against the city.

George P. Stone and A. W. Scott, for the appellant.

T. W. Whitney, Wiener and Draper, and Kelly S. Searl, for the respondent.

LONG, J. This is an action brought to recover the amount of interest due upon a series of municipal coupon bonds, alleged to have been executed and issued by the defendant. The suit was commenced by declaration, in which were set forth copies of the bonds and coupons upon which recovery is sought. Under the plea of the general issue, the defendant gave notice that it would show on the trial that if said bonds and coupons were signed and sealed by the defendant's lawful agents, they were so signed and sealed collusively and fraudulently by said agents and one Robinson, a representative agent of the Toledo, Saginaw, and Muskegon Railway Company; and that the defendant would insist that said

ACTION by the plaintiff against the defendant to recover damages for alleged negligence resulting in the death of plaintiff's husband. The trial court gave a peremptory instruction for the defendant, and the plaintiff appealed. Other facts are stated in the opinion.

Jayne and Watson, for the appellant.

Yerger and Percy, for the appellee.

WOODS, J. There is much evidence in the record tending to show that the highway at the point where plaintiff's deceased husband received his injuries was a public street in Greenville, and we have no reason to suppose that the peremptory instruction of the court below had any relation to this phase of the case.

Let us examine briefly the evidence which was offered for the purpose of showing negligence in the municipality in permitting an obstruction for a long while in the public street,—an obstruction, as it now appears, which was dangerous to persons passing along or using such street.

The obstruction was erected by one Pace about two years before the injury complained of occurred. Whether erected by the permission of the municipality does not appear from the record; but this is not important, since the city's liability for its continuance is clear. There is no dispute as to the knowledge of the city of the existence of the structure in the street. The structure was a tank, holding seventy or eighty barrels of water, placed on a framework, which was itself placed on posts from four to six feet high above the surface of the street. The water which was stored in this tank was used for street-sprinkling purposes and for consumption by citizens. It was immediately in the street, and very near the base of a levee which had been erected across the west end of the street by the board of levee commissioners. To this tank directly persons using the river water were accustomed to come for their supplies, and to it the street-sprinkler came directly also. Within about seventy feet of the tank there were two coal-yards, and all the business of these yards was conducted near it. Now and then small steamboats landed at the foot of this street, and fishing-vessels sometimes tied up at its foot also; and persons from such boats and vessels passed up the street in question, and by this tank, from the river. Persons on foot occasionally used this particular portion of the street to reach the levee.

This tank, thus built and thus situated and thus used, suddenly fell one day in August, 1890, and in its fall the husband of appellant—who at the moment was under it—received injuries which resulted in his death. The immediate cause of the fall of the tank was found to be the breaking in two of one of the timbers constituting the framework upon which the tank sat. This broken piece of timber was found to have been unsound,—“water-sobbed,” as the witness who testified to this fact characterized it. The same witness had, not a great while before, discovered the “water-sobbed” and unsafe condition of this piece of timber.

We agree with counsel for appellee that ordinary care over its streets is the measure of diligence imposed upon municipal corporations, and that they are not insurers against injury to persons using the public streets.

We do not dissent from the elementary principle that before the municipality can be held liable for injuries resulting from nuisances or defects in its streets, it must have knowledge of the nuisance or the defect, and its danger. Notice there must be, to charge the municipality, but this notice may be actual, or constructive, or implied.

Where the obstruction is created by the city itself, or where it permits an obstruction erected by another in its streets, it must take notice of such defects in the obstruction as ordinary care will discover. The structure in a street, to every part of which the entire public has the right of free access, must be erected in such manner and from such materials as to be reasonably safe, and it must be kept in this safe condition. Proper repairs, from time to time, are as much the duty of the city as a safe structure originally.

Inseparably connected with this statement is another, viz., that a municipality is liable for injury resulting from its defective structures, where, by reasonable diligence, it might have acquired knowledge of such defect. The common knowledge of mankind is chargeable to a municipality also. The knowledge of the action of the elements on structures of wood, and of the liability of timber to decay under certain conditions, is to be attributed to municipalities, just as to natural persons. The duty of the municipality to exercise ordinary care to detect such natural decay, and to guard against injuries therefrom, follows necessarily. Recurring now to the facts put in evidence to show the appellee's negligence and consequent liability, we are of the opinion that the city's freedom

from culpability was not so manifestly clear as to leave no room for differences of opinion among reasonable men, and therefore that the question of appellee's negligence should have been submitted to the jury.

Was the deceased free from contributory negligence? Was he guilty of such misuse of the street at the time he was injured as to absolve the municipality from liability in any event? The deceased was engaged in preparing in this open street the timbers necessary to the erection of a dump just beyond the levee, in the river, under a contract with the city. He had been engaged in that work, with the laborers employed by him, for two weeks or more. We take it to be true that the city had the same right to occupy such part of the street in the prosecution of this public work as might be convenient and necessary, in the same manner and to the same extent that an abutting lot-owner may be permitted to employ a part of the street in the erection of a building upon his lot. Presumably, too, the deceased was using the street with the knowledge and under the permission of the municipality. While thus lawfully engaged in the street, the deceased, as an incident to his work, had occasion to sharpen a saw; and in order to do this piece of work, incident to the main enterprise, he placed himself for a few minutes under this tank, in a part of the public street, there being no apparent danger from the structure, and while so situated was fatally injured by the fall of the tank. Suppose he had stood outside the edge of the tank while engaged in his incidental work of saw-sharpening; suppose he had been simply standing near it, supervising the work of his hands, and the injury had occurred, — would he have been so clearly guilty of contributory negligence, or such misuser of the street, as to leave no room for difference of opinion as to his culpability? On all the facts in the case before us, can it be affirmed that only one conclusion can be drawn by reasonable men? Would all reasonable men certainly draw the same inference of contributory negligence from all the evidence in the case? Was there nothing material, of fact or inference, as to which reasonable men might not honestly differ?

We intimate no opinion as to the negligence of deceased, but we are of the opinion that the question should have been submitted to the jury.

Reversed and remanded.

MUNICIPAL CORPORATIONS—LIABILITY FOR UNSAFE CONDITION OF STREETS.

—Municipal corporation owes duty to those who use its streets to exercise ordinary care to make them safe for passage: *Anderson v. East*, 117 Ind. 126; 10 Am. St. Rep. 35; but is not a guarantor or insurer against accidents: *Gosport v. Evans*, 112 Ind. 133; 2 Am. St. Rep. 164; *Shelley v. Austin*, 74 Tex. 608. It must keep its streets in reasonably safe condition: *Alexander v. Big Rapids*, 76 Mich. 282; *Champaign v. Jones*, 132 Ill. 304; *Marseilles v. Howland*, 124 Ill. 547; that is, in such condition that those who are using them properly, and are not so deficient in reasonable prudence and ordinary care as to bring injury upon themselves, can do so without peril: *Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827. The duty of a municipality is measured by circumstances; it requires much greater attention to the condition of a thronged thoroughfare in a populous city than to that of an ordinary highway running through a sparsely settled district, and not along what might be regarded as a dangerous piece of country: *Glasier v. Hebron*, 131 N. Y. 447. Compare *Whitfield v. Meridian*, 66 Miss. 570; 14 Am. St. Rep. 596. As to the liability of city or town for neglect to repair streets, see, generally, notes to *Browning v. Springfield*, 63 Am. Dec. 350–357; *Weisenberg v. Appleton*, 7 Am. Rep. 43, 44.

MUNICIPAL CORPORATIONS. — NOTICE OF DEFECTS IN STREETS: See notes to *Montezuma v. Wilson*, 14 Am. St. Rep. 152; *Whitfield v. Meridian*, 14 Am. St. Rep. 599; *Pettengill v. Yonkers*, 15 Am. St. Rep. 446; *Weisenberg v. Appleton*, 7 Am. Rep. 43. The general rule is, that a city which exercises due care in the maintenance of its streets is not liable for injuries caused by defects therein, unless it has either actual notice of such defects, or the constructive notice which the law imputes to it after the lapse of a period within which knowledge of the defects might, by the exercise of ordinary diligence, have been obtained: *Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594; *Turner v. Newburgh*, 109 N. Y. 301; 4 Am. St. Rep. 453; *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731; *Bradford v. Mayor of Anniston*, 92 Ala. 349; 25 Am. St. Rep. 60; *Rochefort v. Attleborough*, 154 Mass. 140; 26 Am. St. Rep. 221; *Montezuma v. Wilson*, 82 Ga. 206; 14 Am. St. Rep. 150; *Whitney v. Lowell*, 151 Mass. 212. The circumstances of each case must determine whether constructive notice is to be attributed to the city: *Whitfield v. Meridian*, 66 Miss. 570; 14 Am. St. Rep. 596; *Austin v. Ritz*, 72 Tex. 391. To refuse to charge the jury that the city will not be liable for injuries caused by defects, unless there is evidence showing that it had notice of such defects, is ground for reversal: *Galveston v. Smith*, 80 Tex. 69. The notice received must be notice of the particular defect, and not merely of a general defective condition of the street or sidewalk: *Dundas v. Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457. To make knowledge of a general defect equivalent to notice of the particular one, they must at least be of the same general character, or the latter a usual concomitant of the former: *Shelby v. Clayett*, 46 Ohio St. 549. Where injuries are caused by a defective sidewalk, it is immaterial by whom or by what authority it was placed in position. If the city authorities have notice of a defect therein, or it has been built so long that knowledge is presumed, the city is as liable as though the sidewalk had been built by its express authority: *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144. The exercise of that ordinary care which is required involves the anticipation of defects that are the natural and legitimate result of use or climatic influences, or where the corporation had means of knowledge for a sufficient time to have remedied the defect: *Denver v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594.

CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE JURY. — A court cannot say, as a matter of law, that it appears from the allegations of the complaint that the plaintiff was guilty of contributory negligence, unless those allegations so clearly show that fact that there could be no reasonable ground for different minds arriving at different conclusions upon the question: *Rolseth v. Smith*, 38 Minn. 14; 8 Am. St. Rep. 637. In other words, if there may possibly be a difference of opinion as to the conclusion to be drawn, the plaintiff is entitled to go to the jury: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804; *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; 6 Am. St. Rep. 151; *Weber v. Kansas City Cable R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; 18 Am. St. Rep. 441; *Roux v. Blodgett etc. Lumber Co.*, 85 Mich. 519; 24 Am. St. Rep. 102; *Roddy v. Missouri Pacific R'y Co.*, 104 Mo. 234; 24 Am. St. Rep. 333; *Mathews v. Cedar Rapids*, 80 Iowa, 450; 20 Am. St. Rep. 436.

JULIENNE v. MAYOR AND ALDERMEN OF JACKSON.

[69 MISSISSIPPI, 24.]

DOGS RUNNING AT LARGE, CITY ORDINANCE MAY AUTHORIZE KILLING OF, WITHOUT NOTICE. — A municipal corporation may, in the exercise of the police power, provide by ordinance that unmuzzled dogs running at large shall be killed. Such ordinance does not violate the constitutional rights of the owners, although their property is destroyed without notice to them.

"RUNNING AT LARGE," MEANING OF. — A dog found in a street of a city, unmuzzled, and unaccompanied by its owner, is deemed to be "running at large," within the meaning of a city ordinance authorizing the killing of dogs so found, and may be lawfully killed by a police-officer, although it has just escaped from confinement, and the owner is in pursuit of it.

ACTION brought in a justice's court to recover the value of a dog, which was alleged to have been unlawfully killed by a police-officer of the defendant. The city charter conferred the power to provide for the confinement and destruction of dogs when necessary, and a city ordinance provided that between certain dates mentioned all dogs running at large without a muzzle and tag should be destroyed by any policeman of the city. The dog, which was a valuable animal, highly bred, thoroughly trained, and entirely harmless, was killed by the officer while running on the street, unaccompanied, and without a muzzle or tag. The owner had kept the animal upon his premises securely tied, but on the morning on which it was killed, the animal broke its collar, and, without the knowledge of the owner or his family, leaped over the fence and wandered down the street. About ten minutes after the dog's escape, the owner's wife discovered that it had gone, and

started in pursuit, intending to bring it back to the yard, and was only about one hundred yards away when the dog was shot. It was admitted that the officer, in killing the dog, acted under a sense of his official duty. The plaintiff recovered judgment in the justice's court, but on appeal to the circuit court, judgment was rendered for the defendant, and the plaintiff appealed.

Frank Johnston, for the appellant.

J. B. Harris, for the appellee.

COOPER, J. Though the plaintiff's dog was not permitted to be at large knowingly, but escaped from his close, and was soon thereafter followed by the plaintiff's wife for the purpose of returning him to confinement, he was nevertheless "running at large" within the meaning of the ordinance of the city, and was lawfully killed by the city marshal.

It may be conceded that the plaintiff had a property right in the animal, and might have recovered his value as against one unlawfully killing him. But, of all property, dogs are more peculiarly the subjects of police regulations than any other class. They are very generally kept and considered of value because of their tendency to revert to their savage state, and to attack as an enemy any stranger who may approach them; and it is because of the danger to the public arising from these instincts that they are so often and so generally subjected to police regulations, especially in cities and towns.

It is held with great unanimity by the courts that regulations of the most stringent character, and the most summary proceedings for the destruction of these animals kept contrary to such regulations, are entirely within legislative power, and free from constitutional objection, though the property of the owner is destroyed without notice or hearing in the execution of the law.

In Massachusetts, it has been held that a dog, not licensed and collared according to the provisions of law, may be shot within the owner's close by the officer: *Blair v. Forehand*, 100 Mass. 136; 97 Am. Dec. 82; 1 Am. Rep. 94.

So in New Hampshire, under a statute providing that "no person shall be liable by law for killing any dog which shall be found not having around his neck a collar of brass, tin, or leather, with the name of the owner or owners engraved thereon," it was held that a private person might lawfully

kill a dog having on a collar on which was engraved the initials of the owner's name, even though he knew who was the owner, the court saying: "Actual notice of the ownership of the dog will not supersede the necessity of a compliance with the statute. Its provisions are direct and positive, and the consequence of a neglect of the statutory requirements are explicitly stated."

Replying also to the argument that the act conflicted with the constitution, in that it was a taking of private property for public uses, or deprived the owners of their property in dogs, the court said the act had no such effect, but "merely regulated the use and keeping of such property in a manner that seemed to the legislature reasonable and expedient. It is a mere police regulation, such as we think the legislature might constitutionally establish": *Morey v. Brown*, 42 N. H. 373. See also *Tiedeman on Police Power*, sec. 141 et seq.; *Cooley's Constitutional Limitations*, 741.

The judgment is affirmed.

ANIMALS — TAXATION AND REGULATION OF DOGS. — Statutes and ordinances regulating, restricting, or prohibiting the running of dogs at large in cities, and authorizing the summary killing of dogs so running at large, and dividing them into classes, with different fees for registration, are constitutional: *State v. City of Topeka*, 36 Kan. 76; 59 Am. Rep. 529. A city ordinance may authorize impounding of animals running at large in the streets, and sale of them for expenses, without judicial proceedings: *Wilcox v. Heming*, 53 Wis. 144; 46 Am. Rep. 625; *Fort Smith v. Dodson*, 46 Ark. 296; 55 Am. Rep. 589. But an ordinance requiring owner to obtain license for keeping dogs, and subjecting him to arrest, fine, and imprisonment for not procuring such license, is invalid: *Washington City v. Meigs*, 1 McAr. 53; 29 Am. Rep. 578.

ALABAMA AND VICKSBURG R'Y CO. v. BROOKS.

[69 MISSISSIPPI, 168.]

DEMURRER, OVERRULING OF, NOT REVERSIBLE ERROR WHEN. — The overruling of a demurrer to a plea cannot be reversible error, where the defenses set up are substantially availed of under other pleas.

LIBEL — RAILROAD COMPANY LIABLE FOR ITS SUPERINTENDENT'S ACT IN WRITING WHEN. — A railroad company is liable for a libelous letter written by its superintendent in answer to a claim for damages presented to the company, where the writing of such letter is within the scope of his authority.

MOTIVE FOR MAKING LIBELOUS STATEMENT QUESTION FOR JURY. — In an action of libel for writing a letter containing libelous statements, the

question whether the writer believed the truth of the statements is for the jury, and his assertion is not conclusive of what the motive was.

LIBEL — QUALIFIED PRIVILEGE OF PERSON APPLIED TO FOR INFORMATION.

— A person to whom application is made for information may, within the limits thereof, write or speak words which, under other circumstances, would subject him to a suit for libel or slander, but the scope of the defamatory matter must not exceed the exigency of the occasion. And he cannot take license from the occasion to gratify his malice, or to state as facts libelous matter which he does not believe to be true.

MALICE, BURDEN OF PROOF OF, ON PLAINTIFF, WHEN COMMUNICATION PRIVILEGED. — In an action for libel, if the communication was privileged, the burden of proving malice is upon the plaintiff, who must offer some evidence of its existence beyond the mere falsity of the charge.

LIBEL, PUBLICATION OF, COMPLETE WHEN. — Where a person, to whom a claim is presented by attorneys in behalf of their client, in replying, exceeds his privilege by sending to the attorneys a letter containing defamatory statements concerning the client, the publication is complete when the libelous letter is received and read by the attorneys.

ACTION of slander based on an alleged libelous letter written to the plaintiff by the defendant's superintendent. The plaintiff was a passenger on the defendant's road, and his valise was lost or mislaid at Vicksburg. He made out a claim against the company for the loss of the valise and its contents, which he placed in the hands of his attorneys, Dabney and McCabe, to collect, delivering to them his check. The attorneys wrote a letter to the company, which was received by its superintendent at Vicksburg, demanding payment of the claim, and in reply received the following letter, upon which this action is based: —

“**MESSRS. DABNEY & McCABE, City.**

“*Gentlemen,* — I have yours of the 16th inst., inclosing very modest claim for only \$1,155, on account of the alleged loss of J. S. O. Brooks's valise.

“I have investigated this matter thoroughly, and find that this claim is based simply on Mr. Brooks holding one of our checks. This valise, together with his trunk, arrived at Vicksburg ‘O. K.,’ and he simply walked off with the valise without giving the baggage-master an opportunity to take the check up, and the next day sent down the check, together with one for his trunk, and requested that we deliver this baggage. As the matter stands, I think that if Mr. Brooks sees fit to press his suit we will have to take some action in regard to his taking this property away while it was in possession of the railroad company without giving up his check.

“Yours truly,

W. W. BOND, Supt.”

At the trial, plaintiff's evidence showed that he had not taken the valise as charged in the letter of Bond. The evidence also tended to show that all the knowledge of the matter which Bond possessed at the time he wrote the letter was derived from letters received from the claim agent and baggage agent of the defendant, neither of whom knew how the valise was lost. Bond was examined as a witness for the defendant, and testified that he did not know the plaintiff, and that he had no malice or ill feeling against him, and that he sent the letter to the attorneys in good faith, and with no intent to defame. There was no evidence of malice outside of the statement contained in the letter. The plaintiff sustained no pecuniary damages by the writing of the letter. There was evidence tending to show that it was within the scope of the duties of Bond, as superintendent, to investigate the alleged loss of the valise, and to write the letter complained of; but there was also evidence to the contrary, and rules and regulations promulgated by the general manager of the defendant were introduced, showing that claims for lost baggage should be referred to the general baggage-master. A motion to exclude the plaintiff's testimony and for judgment was overruled, and a request to instruct peremptorily for the defendant was refused. The jury returned a verdict of five hundred dollars for the plaintiff, and a motion for a new trial having been refused, the defendant appealed. Other facts are stated in the opinion.

Nugent and McWillie, for the appellant.

Dabney and McCabe, for the appellee.

COOPER, J. If it be conceded that the demurrer to the second plea should have been overruled, no reversible error would be shown, since, under the general issue, and under the third and fourth pleas, the defendant had advantage of all matters of defense set up in the second plea. In truth, the whole controversy was upon the facts set up by that plea, and which, upon the demurrer being sustained, were substantially restated in pleas 3 and 4.

The defenses introduced were, that Bond had no authority, as agent of the defendant, to write the letter, and if he had, that, under the circumstances, it was not a libel. The extent of the agency of Bond was fairly submitted to the jury, and it cannot be said that the verdict, by which it is found that he was the representative of the defendant in relation to the

business in which the letter was written, is not supported by the evidence. Bond himself was examined as a witness, and did not deny his authority to act for the company. He professed, by acting, to have authority. Other executive officers of the company recognized his right so to act, and ample other evidence appears of record to show that his act was within the scope of his duty.

The court, by instructions to the jury, gave to the defendant the benefit of its defense that the letter alleged to be libelous was in reply to a communication from the plaintiff's attorneys. It told the jury that the circumstances created a qualified privilege, and that the defendant could only be liable upon proof of malice, or the absence of honest belief in the truth of the statements contained in the letter; in other words, that the defendant was not liable if its servant, in making reply to the letter of the attorneys, kept himself within the privilege of the occasion, but was liable if he took advantage of the opportunity afforded by the occasion to maliciously libel him, or to write concerning him libelous matter which he did not believe to be true.

That Bond intended by his letter to charge the plaintiff with larceny of the lost baggage, or with having lawfully taken it away, and then to have conceived the purpose of fraudulently recovering its value from the defendant, by reason of his yet having its check in his possession, was admitted by him while testifying. It is true, he affirmed that he honestly believed these facts to be true, but whether he did or did not so believe was a question for the determination of the jury, and his assertion is not conclusive of what the motive was: *Starkie on Evidence*, sec. 89; *Elmer v. Fessenden*, 151 Mass. 359.

One to whom application is made for information may, within the limits thereof, write or speak words which, under other circumstances, would subject him to suit for libel or slander, but "the scope of the defamatory matter must not exceed the exigency of the occasion": *Cook on Defamation*, 35. Nor can he take license from the occasion to gratify his malice, or to state as facts libelous matter which he does not believe to be true. The exemption from responsibility for libel in privileged communications are of two classes: 1. Those of absolute privilege, in which no action lies, though the motive be malicious, of which class are included legislative and judicial proceedings: 13 Am. & Eng. Ency. of Law,

406; *Verner v. Verner*, 64 Miss. 321. 2. Qualified privilege for libel, in which no inference of malice arises from the mere fact of the prejudicial statement, but the plaintiff must prove malice in fact. "The term 'privileged,' as applied to a communication alleged to be libelous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge": *Lewis v. Chapman*, 16 N. Y. 369; *Wright v. Woodgate*, 2 Crompt. M. & R. 573; *Toogood v. Spyring*, 1 Crompt. M. & R. 181; *Delaney v. Jones*, 1 Esp. 193; 4 Com. P.; *Laughton v. Bishop of Sodor and Man*, L. R. 4 Com. P. 504; *Spill v. Maule*, L. R. 4 Ex. 232; *Clark v. Molyneux*, L. R. 3 Q. B. D. 237.

The plaintiff, recognizing the occasion of the publication as privileged, assumed the burden of establishing the malice of the defendant's superintendent, and by the verdict of the jury shows that he has supported his contention in that behalf. We are not prepared to say that the verdict is not correct.

The publication was complete when the libelous letter was received and read by Messrs. Dabney and McCabe, the plaintiff's attorneys. This necessarily follows from the establishment of the fact, settled by the verdict, that the defamatory statement was not covered by the privilege of the communication. The letter from the attorneys called for any lawful reply from the officers of the defendant, but it did not invite any malicious defamation of their client; and the defendant's superintendent, by exceeding the privilege, deprived his principal of any defense it might have had if he had kept within it.

Affirmed.

LIBEL, LIABILITY OF CORPORATION FOR. — A corporation is responsible for publication of a libel, which is shown to have been made by its authority, or to have been ratified by it, or to have been made by a servant or agent in the course of his employment: *Fogg v. Boston etc. R. R. Corp.*, 148 Mass. 513; 12 Am. St. Rep. 583, and note, citing other cases in the series to the same point. The damages allowed may be either actual or exemplary: *Missouri etc. R'y Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794. But a corporation is not responsible for a libel of an employee published by its general superintendent without its authority: *Henry v. Pittsburg etc. R. R. Co.*, 139 Pa. St. 290.

LIBEL — MALICE. — The question of malice in publishing a libel is to be decided by the jury. But the deliberate publication of a calumny, knowing

it to be false, without having reason to believe it true, is conclusive evidence of malice: *Bordwell v. Osgood*, 3 Pick. 379; 15 Am. D:c. 228. In *Hyde v. McCabe*, 100 Mo. 413, it was held that the question whether defendant had made the charge (of false swearing) maliciously, without believing it to be relevant, and without reasonable or probable grounds for such belief, was one of fact for the jury: *Warner v. Press Pub. Co.*, 132 N. Y. 181. But proof of the existence of this actual malice is only necessary to lay the foundation for exemplary or enhanced damages. Legal malice need not be proved. The law imputes it to the publisher of a libel from the act of publication: *Burt v. Advertiser Co.*, 154 Mass. 238; *Weil v. Israel*, 42 La. Ann. 955. See also note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 337, 338. In an action for libel against a corporation, its officers may testify that they had not, and to their knowledge no officer or employee of the company had, any hatred, or ill-will, or malicious intention toward the plaintiff in the publication of the alleged libel: *Brown v. Massachusetts etc. Ins. Co.*, 151 Mass. 127.

LIBEL — MALICE — BURDEN OF PROOF, WHERE COMMUNICATION PRIVILEGED.— Privileged communications are of two kinds: 1. Absolute privilege, where the defamatory words are uttered in the course of the performance of public service, in which case, notwithstanding proof of the falsehood of the charge and actual malice, an action cannot be maintained thereon. 2. Qualified privilege, where the alleged libelous language is spoken by one under no legal obligation to act, about a matter affecting the public good. In such case there is a presumption of law that the words were spoken *bona fide*, and the burden is on the plaintiff to show the falsity of the charge, and that it was made with express malice. In the latter case, evidence that the charge was false will not of itself be sufficient to establish malice, unless there is proof that the defendant knew it to be false, or that there were opportunities available to him, whereby he might have ascertained the truth, but which he neglected: *Rumsey v. Check*, 109 N. C. 270.

LIBEL — PRIVILEGED COMMUNICATIONS, WHAT ARE.— Privileged communication is one made under such circumstances as to repel the legal inference of malice, and to throw upon the plaintiff the burden of showing malice otherwise than by merely proving the falsity of the charge made: *Rothholz v. Dunkle*, 53 N. J. L. 438; 26 Am. St. Rep. 432. See also notes to *Byam v. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, and *Conroy v. Pittsburg Times*, 139 Pa. St. 334, 23 Am. St. Rep. 188, where other cases relating to this subject are collected. The question whether the publication is privileged is one of law for the court, unless the facts are disputed: *Warner v. Press Publishing Co.*, 132 N. Y. 181; *Rumsey v. Check*, 109 N. C. 270.

LIBEL — WHAT IS A SUFFICIENT PUBLICATION.— To constitute publication of a libel, the contents need not be made known to the public generally. It is enough if they be made known to a single person: *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455; or if the accused, with intent to scandalize, affords, or causes to be afforded, to another the opportunity of learning the contents of the libelous instrument, although the contents do not thereby become known: *Haase v. State*, 53 N. J. L. 34. And although written words are not published in the sense that will support a civil action, where the instrument containing them reaches the person only of whom they are written: *Fonville v. McNease*, Dud. (S. C.) 303; 31 Am. Dec. 556; the sender of a libelous letter will nevertheless be liable for its further publication by the receiver, if such further publication was a probable consequence of sending it: *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768.

JOHNSON v. ALABAMA AND VICKSBURG R'Y Co.

[60 MISSISSIPPI, 191.]

RAILROAD COMPANY CARRYING LIVE-STOCK NOT JUSTIFIED IN REFUSING TO LAY OUT CAR WHEN. — Where it is found that cattle being transported in a railroad car with hogs are suffering, the conductor of the train is not justified in refusing, upon the shipper's request, to lay out the car at a station, merely because the stock-pen at that station is unsafe for hogs, it not appearing that the cattle could not be separately unloaded, or that the railway company was under no duty of having a pen safe for hogs as well as for cattle.

COMMON CARRIER CANNOT BY CONTRACT EXEMPT HIMSELF FROM LIABILITY FOR NEGLIGENCE. — A common carrier of freight is liable for injuries thereto resulting from his negligence, notwithstanding he has, by special contract with the shipper, stipulated against liability, except for injuries caused by his fraud or gross negligence.

BURDEN OF PROOF ON CARRIER CLAIMING EXEMPTION WHEN. — When a common carrier claims exemption from liability for injury to goods under a special contract, the burden of proof is upon him to show that the loss or damage resulted from one or more of the excepted causes in the contract, and without his fault.

THE plaintiffs shipped a mixed car-load of cattle and hogs on the defendant's railroad from Morton to Jackson, under a contract which stipulated that the company should be exempt from liability for all damages incident to railroad transportation not caused by its own fraud or gross negligence, and further, that the business of the company should not be delayed by the detention of trains to unload or reload stock for any cause whatever; but cars might be left at a station, upon request of the person in charge of the same, to be forwarded by the next freight train, provided the condition of the stock required that it be fed and rested. When the train reached Brandon, the cattle were found to be suffering, and the shipper's agent requested the conductor to allow the car to be switched and laid out, but the conductor refused, on the ground that the stock-pen at that station would not confine the hogs. The train was considerably delayed, and much switching had to be done before it reached its destination at Jackson. The evidence tended to show that the switching was attended with violent shocks to the cattle. When the car finally reached the stock-pen, several of the cattle were dead, others were injured, and several of the hogs were found to have escaped. This action was brought by the shippers, who were also the consignees, to recover damages for the alleged negligence of the company. The following are the instructions referred to in the opinion: "2. The contract in

evidence, though signed several days after the loading of the stock, is the contract made at the time of shipment, and under it the plaintiffs stipulated that the business of the company shall not be delayed by detention of trains to load or unload stock, and if the jury believe from the evidence that after the train arrived at Jackson the stock-car was placed at the stock-pen as soon as it reasonably could be, in view of the incoming of the passenger train and the switching of the cars of the Illinois Central railroad, the jury will find for defendant. 3. If the jury believe from the evidence that the stock in controversy was shipped by the plaintiffs or their agent, Tennant, from Morton, to be transported to Jackson, upon the contract read in evidence, the consignee of plaintiffs assumed thereby all risk of injury, loss or damage, or depreciation which the animals might suffer in consequence of their being weak, or escaping, or injuring themselves or each other, in consequence of unloading, heat, suffocation, fright, or viciousness, and all other damages incidental to railroad transportation, unless such damages shall have been caused by the fraud or gross negligence of defendant, and it devolves upon the plaintiffs to show that such fraud or negligence occasioned the loss and damage." There was a verdict and judgment for the defendant, and the plaintiffs appealed.

C. M. Williamson, for the appellants.

Nugent and McWillie, for the appellee.

WOODS, J. The second instruction given for the appellee was erroneous, in that it withdrew from the jury's consideration any right to a recovery that the plaintiffs may have had under their contract of shipment, and under the evidence as to the condition of the cattle at Brandon, and their request to be laid out there for unloading. While it is undisputed that the conductor declined to lay out the car-load of stock at Brandon because the stock-pen at that station would not hold the hogs safely, yet this afforded no adequate excuse for the denial with which the plaintiffs' request was met. From anything that appears to the contrary, the conductor might have complied with the request, and have avoided all loss and damage to the shippers. The cattle might have been unloaded into the pen at Brandon (and they were the suffering animals), and the hogs might have been retained in the car. At any rate, the mere fact that the cattle-pen was not capable of holding hogs securely was not conclusive of the other fact, that

the condition of the pen at Brandon was such as to justify the conductor's refusal to lay out the car at plaintiffs' request; nor was it conclusive of the assumption necessarily involved, to the effect that the railway company was under no duty of having a pen safe for hogs as well as for cattle. These questions, which were important, were excluded from the jury by this instruction.

The third instruction given for the appellee is not sound. This instruction put upon the plaintiffs the burden of proving that the fraud or gross negligence of the carrier was the cause of the loss and damage. The instruction permits the railway company to avail itself of the provision in the special contract offered in evidence on the trial, exempting itself from liability for injuries resulting from its negligence. It will be observed that the instruction declares exemption from liability unless in cases occasioned by the gross negligence of the carrier. Whatever gross negligence may be, it was error to confine liability to cases arising out of that or fraud only. If the defendant was negligent at Brandon, or at Jackson, or elsewhere, in any particular, it was liable, if the loss was occasioned by such negligence.

The instruction was erroneous, furthermore, in putting the burden of proof upon the plaintiffs in every aspect of the case, even if the damage was caused by the fraud or negligence of the railway company. The true rule is, that the burden is on the railway company claiming exemption from liability under a special contract, to prove that the loss or damage resulted from one or more of the excepted causes of the contract, and without fault of the railway's servants. "The carrier, in such case, must show, at least *prima facie*, that the injury did not result from neglect": *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1017. The instruction, as it appears to us, reverses this salutary rule, and puts the burden upon the plaintiffs of showing that, through fault of defendant, — its gross negligence or fraud, as the instruction erroneously expresses it, — the injury took place.

Reversed and remanded.

RAILROAD COMPANIES. — DUTIES AND LIABILITIES AS CARRIERS OF LIVESTOCK: See extended note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208-217. Where, under a special freight contract, a railroad company furnishes an entire box-car to a shipper of horses, the contract requiring him to load and unload the car, and to accompany it, and feed, water, and care for the stock, all at his own risk and expense, and exempting the company from

liability for delays of the train, and there is no agreement as to any lay-out along the route, and the stock can be fed and watered without leaving the car, the owner does not, in the absence of a custom to that effect, acquire by such contract the right to have the car stopped and laid out along the route, so that he may rest his horses and rearrange the load: *Illinois Cent. R. R. Co. v. Peterson*, 68 Miss. 454.

COMMON CARRIERS — EFFECT OF SPECIAL CONTRACT LIMITING LIABILITY. — A common carrier cannot stipulate against his own gross negligence; and it is gross negligence for one of its conductors to refuse to supply water to hogs that are being transported in its cars, after being requested to do so by the owner: *Illinois Central R. R. Co. v. Adams*, 42 Ill. 474; 92 Am. Dec. 85. This power of a company to limit its liability to cases of gross negligence is not approved in the majority of the states: See note to last-named case. The more approved doctrine is, that the carrier cannot limit his liability for negligence: See note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 725, 726; *Merchants' etc. Transp. Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847; *Willing v. St. Louis etc. R'y Co.*, 101 Mo. 631; 20 Am. St. Rep. 636; *Chicago etc. R'y Co. v. Chapman*, 133 Ill. 96; 23 Am. St. Rep. 587.

ACTIONS AGAINST COMMON CARRIERS. — BURDEN OF PROOF is upon carrier, in case of loss, to show that such loss arose from a cause for which he was not responsible: *Merchants' etc. Transp. Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847. The same rule prevails in cases where there is a special contract; and, as he cannot relieve himself by such contract from liability for negligence, he must show that the loss was caused by something else than his negligence, and that there was no negligence in fact on his part: *Hull v. Chicago etc. R'y Co.*, 41 Minn. 510; 16 Am. St. Rep. 722. So, also, the burden of proof that the cause of death of live-stock in course of transportation was within the exception qualifying his general liability is upon the carrier: *Lindeley v. Chicago etc. R'y Co.*, 36 Minn. 539; 1 Am. St. Rep. 692.

CRESCENT INS. CO. v. VICKSBURG, YAZOO, AND SUN- FLOWER RIVER PACKET CO.

[69 MISSISSIPPI, 208.]

MARINE INSURANCE — "PERILS OF THE RIVER" WITHIN TERMS OF POLICY OF. — Injury to cotton which is wet by being thrown from the deck into the river by the sudden careening of a steamboat is a peril of the river within the meaning of a policy of marine insurance, notwithstanding the careening of the boat may have resulted from the negligence or unskillfulness of those engaged in unloading her. To relieve from liability because of acts of the master or crew, there must be want of good faith and honesty of purpose.

THE appellee owned a steamboat plying on the Yazoo River. The master of the boat obtained from the appellant a policy of marine insurance on the cotton with which she was loaded on the trip in question. The policy provided that "the liabilities and perils assumed by the company are of rivers, fires,

jettisons, and all other perils, losses, and misfortunes that have or shall come to the injury, damage, or detriment of said property, or any part thereof, by reason of the dangers aforesaid." It also stipulated that "the insurers shall not be liable for damage by breakage, wet, or dampness, or by being spotted, discolored, or moldy, unless the same be caused by some disaster to the vessel by which said goods shall have come into contact with the water." Part of the cotton was destined to New Orleans, and had to be transferred to the connecting boat at Vicksburg. The New Orleans boat was landed alongside of appellee's boat, and the former's crew began to unload and transfer the cotton. They took too many bales from one side of the boat, and this caused her to suddenly careen, and about fifty bales of her cargo were thrown into the river. The packet company paid to the owners of the cotton, in satisfaction of the damage, the sum of \$257, and this action was brought to recover that amount from the insurance company. The court gave judgment for the plaintiff, and the defendant appealed.

Birchett and Shelton, for the appellant.

Dabney and McCabe, for the appellee.

CAMPBELL, C. J. The injury to the cotton by water of the river, into which it was thrown by a mishap to the boat, was a peril of the river within the terms of the policy; and if it be true that the careening of the boat resulted from negligence in unloading, the insurer is liable: *Redman v. Wilson*, 14 Mees. & W. 476. The immediate cause of injury to the cotton was water of the river. That it got into the river because of some carelessness or unskillfulness of those engaged in unloading does not relieve the insurer from liability. To relieve from liability because of acts of the master or crew, there must be want of good faith and honesty of purpose: 1 Phillips on Insurance, sec. 1049; May on Insurance, sec. 408; Flanders on Fire Insurance, 477; 14 Am. & Eng. Ency. of Law, p. 383, note 2, and numerous cases. On this subject there is no difference between marine and other insurance. Whatever diversity of view on this question once existed, it is now firmly settled in England and America as stated above. "Where a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not inquired into": *General Mut. Ins. v. Sherwood*, 14 How. *361.

Affirmed.

MARINE INSURANCE. — PERILS OF THE SEA, WHAT ARE: See extended note to *Van Hens v. Taylor*, 41 Am. Dec. 281-290. Perils of the sea are all perils, losses, and misfortunes of a marine character incident to a ship as such: *Miller v. California Ins. Co.*, 76 Cal. 145; 9 Am. St. Rep. 184. In the recent case of *Petrie v. Phoenix Ins. Co.*, 132 N. Y. 137, where the policy covered "perils of the seas, canals, rivers, etc.," it was held that the loss of a canal-boat, which, after having arrived at its destination, grounded and sunk when the tide ebbed, was within the perils insured against.

NEGLIGENCE OF THOSE IN CHARGE OF THE SHIP is not a defense to an action on a marine insurance policy: *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35; 35 Am. Rep. 589; *American Ins. Co. v. Insley*, 7 Pa. St. 223; 47 Am. Dec. 509.

BURNS v. DREYFUS.

[60 MISSISSIPPI, 211.]

CO-TENANCY — BONA FIDE ENCUMBRANCER OF CO-TENANT'S INTEREST, RIGHT OF. — The lien in favor of one co-tenant against the interest of another, which in the partition of lands held in common is allowed for what may be found due on an accounting between them touching the receipts and disbursements from and concerning the common estate, is not entitled to priority over a *bona fide* purchaser or encumbrancer of the interest of one of the co-tenants in the common estate.

INJUNCTION, DAMAGES ALLOWED UPON DISSOLUTION OF. — When an injunction to restrain the sale of land under a trust deed is dissolved, the party enjoined is entitled to the statutory damages allowed by the code.

JOHN W. BURNS, who was a tenant in common with Edward and Elizabeth Burns of certain real estate in the city of Jackson, had possession of the property and received and appropriated the rents for several years. Subsequently, he gave to Dreyfus and Ascher a trust deed of the property to secure a debt he owed them. The debt not having been paid, the trustee, in pursuance of a power of sale, advertised his interest in the property to be sold. The other tenants in common thereupon filed their bill, making Dreyfus and Ascher, their trustee, and John W. Burns parties defendant, praying for a sale of the property for partition, and asking that a lien be decreed in their favor on the interest of John W. Burns for the amount to be found due them on an accounting in respect to receipts and disbursements, and that this lien be given priority over the lien of the trust deed. An injunction was also asked and obtained to enjoin the sale. Dreyfus and Ascher answered, denying the equity of the bill, and asserting priority of their claim under the trust deed as to a one-third interest in the property. They moved to dissolve the injunction, and asked

an allowance of five per cent on the amount of the debt and a reasonable solicitor's fee as damages. On the hearing of the motion, it was shown that John W. Burns was insolvent, and that he had appropriated the rents. A decree was entered, modifying the injunction so as to allow the trustee to sell the interest of John W. Burns to pay the debt of Dreyfus and Ascher. From this decree the complainants appealed, the chancellor allowing a *supersedeas*, and Dreyfus and Ascher appealed from so much of the decree as refused to grant them damages on the dissolution of the injunction.

E. E. Baldwin, for the appellants, *Edward Burns et al.*

M. M. McLeod, for the appellees, *Dreyfus et al.*

COOPER, J. We recognize to its full extent the equitable principle that in the partition of lands held in common the court will, in the division of the property, or of its proceeds if indivisible, and therefore sold for partition, do full justice between the co-tenants by directing accounts to be taken of receipts and disbursements by them, and will so apportion the fund as to do complete equity. This rule of equitable administration is frequently spoken of as a "lien" in favor of one co-tenant against the interest of the other, but it has never, so far as we are advised, been held to be entitled to priority over the right of a *bona fide* purchaser or encumbrancer of the interest of one co-tenant in the common estate.

The contention of the complainants is, that a purchaser of the interest of one tenant in common takes his estate subject to the right of the other co-tenants to subject it to whatever may, on a final accounting, be found due to them from his vendor. If there is any authority for this position, we have not been referred to it, and we know of none. Certainly, the cases cited by counsel do not support his contention, and so far as we can see, have no relevancy to the point. It would require many cases to constrain us to yield our assent to the proposition contended for. We do not believe one can be found, and we approve the decree of the chancellor in so far as it is presented by the appeal of complainants. On dissolution of the injunction, the defendants Dreyfus and Ascher were entitled to the statutory damages, as provided by section 1918 of the code.

The decree must, to that extent, be reversed, and the court below directed to award damages as indicated.

Co-TENANCY. — As to the liability of one co-tenant to account for rents and profits, see notes to *Harly v. Friend*, 78 Am. Dec. 665-668; *Graham v. Pierce*, 100 Am. Dec. 669, where other cases in the series are collected; *Fulmer's Appeal*, 15 Am. St. Rep. 666. Where one tenant in common occupies and cultivates the common estate, to the exclusion of his co-tenants, the latter have a right to an account of the profits of the crop produced, but no property in the crops, and therefore a mortgage of such crops by the occupying tenant is good against his co-tenants, and the mortgagee is not liable to account to them: *Bird v. Bird*, 15 Fla. 424; 21 Am. Rep. 296.

CONVEYANCES BY ONE TENANT IN COMMON. — The deed of a tenant in common conveys the proportional interest only of the grantor to the portion of the common property described: *Dennison v. Foster*, 9 Ohio, 126; 34 Am. Dec. 429; *Smith v. Benson*, 9 Vt. 138; 31 Am. Dec. 614. Such a deed cannot affect the title or interest of their co-tenants, whatever title such deed may purport to convey: *Bigelow v. Topliff*, 25 Vt. 273; 60 Am. Dec. 264.

ALABAMA AND VICKSBURG R'Y Co. v. BOLDING.

[69 MISSISSIPPI, 255.]

JUDGMENT NOT VOID CANNOT BE VACATED BY SAME COURT AT SUBSEQUENT TERM. — Unless a judgment is void, it cannot, at a subsequent term, be vacated or reversed by the court that rendered it. For mere irregularities or errors of law, the appellate court alone can reverse or annul a judgment after the term at which it is rendered.

MOTION TO VACATE JUDGMENT, ERRORS NOT CONSIDERED UPON. — Upon a motion to vacate a judgment made at a subsequent term, the sufficiency of the declaration on a demurrer, or of the return of the summons on its face, and the action of the court in allowing a judgment of default to be set aside, the sheriff's return to be amended, and judgment by default to be again taken, and a writ of inquiry to be then immediately executed and followed by judgment final, will not be considered, since all these matters involve a question of error or not, and not of jurisdiction.

DECISION OF QUESTION OF FACT BY TRIAL COURT NOT DISTURBED ON APPEAL WHEN. — Where the evidence upon the trial of an issue of fact is conflicting, the decision of the trial court thereon will not be disturbed by the supreme court, if it believes it to be warranted by the testimony.

DE FACTO OFFICER, PERSON ACTING UNDER APPOINTMENT IS, WHEN. — A person acting as a deputy sheriff, under appointment by the sheriff, is a *de facto* officer, although he has not qualified as prescribed by law, and, as between third persons, his acts must be held valid.

SUMMONS, SERVICE OF, ON AGENT OF CORPORATION SUFFICIENT. — Service of summons on the station agent of a railroad company is sufficient to authorize a judgment against the corporation, whether its principal place of business is in the county in which the action is brought or not.

MISNOMER — PERSON SUED AND SERVED BY WRONG NAME CANNOT DISREGARD SUMMONS. — A person summoned by a wrong name, who is thereby informed that he is sued, although not correctly described by his true name, if he appears and does not plead misnomer, waives it, and will be bound by a judgment in the wrong name. In the application of this rule, no distinction is made between natural persons and corporations.

THIS action was brought by the appellee, a minor, by his next friend to recover damages for personal injuries. The declaration was against the "Alabama and Vicksburg Railroad Company," and so was the summons. The first return on the summons was as follows:

"Executed this twentieth of November, 1890.

"R. J. HARDING, Sheriff.

"By J. J. GOLD, D. S."

A judgment by default was entered on this return, at the return term, and a writ of inquiry awarded to ascertain the damages. On the day for the execution of the writ of inquiry, no appearance having been entered for the defendant, the court set aside the former judgment by default, and allowed the return to be amended so as to read as follows: "Executed in person upon the defendant, by handing to C. W. Barber, agent of the Alabama and Vicksburg Railroad Company, at Edwards, Hinds County, Mississippi, a true copy hereof." A new judgment by default was then entered, a jury impaneled, evidence taken, and a verdict rendered for five thousand dollars against the Alabama and Vicksburg Railroad Company. Execution was levied on the property of the Alabama and Vicksburg Railway Company, which filed this petition to have the judgment vacated and the execution quashed. Barber testified that the summons had not been served on him, but Gold testified that he had personally served the summons on Barber. Gold was shown to have been appointed, in writing, by the sheriff, but had not taken the oath which the law required to be subscribed and filed in the office of the clerk of the board of supervisors. He had, however, acted as a deputy sheriff for several years. The court denied the petition, and the petitioner appealed.

W. L. Nugent, for the appellant.

R. N. Miller and J. K. McNeely, for the appellee.

CAMPBELL, C. J. The only ground on which the motion to vacate the judgment could be sustained is that it is void. Mere irregularities — questions of error or no error — such as might cause a reversal on appeal, and for which the judgment would not be pronounced void, cannot be availed of by motion before the court which rendered the judgment. It cannot, at a term subsequent to the judgment, reverse or annul it for mere errors of law in the proceedings. Only this court can do that.

The only ground, of those alleged, on which the judgment assailed could be held to be void is, that the defendant was not summoned as the law provides, so as to give the court jurisdiction to pronounce judgment against it. The sufficiency of the return of the summons on its face, and of the declaration on a demurrer, and the action of the court in allowing the judgment by default taken on the first return of the summons to be set aside, the return by the sheriff's deputy to be amended, and judgment by default to be again taken and writ of inquiry to be then immediately executed and followed by judgment final, are all matters pertaining to the practice of the court, with a party properly before it, and involve a question of error or not, and not of jurisdiction.

Was the defendant duly summoned? If not, the judgment should be vacated. If the defendant was summoned as the law requires, no relief can be had. The solution of this question involves both fact and law. It is a question of fact whether or not the summons was served on Barber, as agent. The evidence is somewhat conflicting, and the circuit judge found the fact in favor of the plaintiff, and we are not willing to set aside this conclusion, believing it to be warranted.

The questions of law are, the sufficiency of service of the summons by Mr. Gold, describing himself as deputy sheriff, the sufficiency of a service of summons on Barber, agent, and the validity of a judgment against the appellant on service of the summons issued against the Alabama and Vicksburg Railroad Company.

Although Gold had not qualified as prescribed by law for deputy sheriffs, he was acting as such under appointment by the sheriff; was a *de facto* officer; and, between third persons, his acts must be held valid.

Service of summons on an agent such as Barber was—a station agent—was sufficient to authorize judgment against the corporation he represented: Code, sec. 1529. It matters not whether the office or principal place of business of the corporation was in the county in which the action was brought or not.

The declaration and summons were against the Alabama and Vicksburg Railroad Company. The summons was served on Barber, station agent of the Alabama and Vicksburg Railway Company, and the judgment by default was against the Alabama and Vicksburg Railroad Company, on which execution issued against Alabama and Vicksburg Rail-

road Company. The claim is, that a valid judgment could not be given in this state of case under which to take the property of the Alabama and Vicksburg Railway Company.

The question is as to the effect of the misnomer. There are cases which hold that one sued and served by a wrong name may disregard the summons. All agree that one summoned by a name not his own, and who appears and does not plead misnomer, waives it, and is bound by the judgment in the wrong name. There is no sound reason for a distinction in the two classes of cases. The true view is, that one summoned by a wrong name, being thus informed that he is sued, although not correctly described by his true name, not availing of his opportunity to appear and object, whereby the true name would be inserted in the proceedings (Code, sec. 1581), should be precluded from afterwards objecting. Having remained silent when he might and should have spoken, he must ever afterwards be silent as to this matter. This view is sustained by the books: 1 Black on Judgments, sec. 213; Freeman on Judgments; *Welsh v. Kirkpatrick*, 30 Cal. 202; 89 Am. Dec. 85; *Lafayette Ins. Co. v. French*, 18 How. 404; *First Nat. Bank v. Jagers*, 31 Md. 38; 100 Am. Dec. 53; *Hoffield v. Board etc.*, 33 Kan. 644; *Waldrop v. Leonard*, 22 S. C. 118; *Smith v. Bowker*, 1 Mass. 76; *Medway Cotton Mfg. Co. v. Adams*, 10 Mass. *360; *Guinard v. Heysinger*, 15 Ill. 288; *Parry v. Woodson*, 33 Mo. 347; 84 Am. Dec. 51; *Waterbury v. Mather*, 16 Wend. 611; *Smith v. Patten*, 6 Taunt. 115.

There is no distinction in this respect between natural persons and corporations. When a summons is served on the authorized agent of a corporation, it is served on the corporation. He is the corporation for this purpose, and it is because of this that a judgment by default may be rendered at the return term against the corporation on whose agent summons is personally served, as we hold may be done. The case of *Lafayette Ins. Co. v. French*, 18 How. 404, cited above, is, besides sustaining our view as to the misnomer, a decision directly in point as to the effect of service on an agent of a corporation. It binds the corporation just as if the service was on one designated by the charter to receive it, or authorized to do so by its power of attorney. It must be so, for process can be served on a corporation in no other way than by service on some officer or agent qualified by law for that purpose, and, "for the purpose of receiving such service, and be-

ing bound by it, the corporation is identified with such agent or officer."

Affirmed.

VACATING JUDGMENTS AT A SUBSEQUENT TERM. — Court cannot at a subsequent term modify or set aside a regular judgment, except upon an application to rehear, or because of accident, mistake, or inadvertence of the court, surprise, or excusable neglect: *Cook v. Moore*, 100 N. O. 294; 6 Am. St. Rep. 587; or to correct clerical errors or omissions; or when the judgment is void upon its face, either for want of jurisdiction of the subject-matter or of the parties: *Carlisle v. Killebrew*, 91 Ala. 351; 24 Am. St. Rep. 915. In striking out a judgment after the lapse of the term in which it is entered, the court acts in the exercise of its *quasi* equitable powers, and this power will never be exercised except to promote the ends of justice; and it must further appear that the party making the application has acted in good faith and with ordinary diligence: *Snowden v. Preston*, 73 Md. 261.

APPEAL. — When evidence is conflicting, judgment will not be disturbed on appeal: *Bohannon v. Combs*, 97 Mo. 446; 10 Am. St. Rep. 328, and note; *Kansas City etc. R. R. Co v. Kier*, 41 Kan. 661; 13 Am. St. Rep. 311; *Missouri Pac. R'y Co. v. Platzer*, 73 Tex. 117; 15 Am. St. Rep. 771; *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56; 20 Am. St. Rep. 395.

OFFICERS. — Acts of officer *de facto* are recognized as valid so far as they affect the public and third persons: *Hankin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176; *Magneau v. City of Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436.

SERVICE OF PROCESS ON CORPORATIONS: See note to *Hampson v. Weare*, 66 Am. Dec. 119-122. To bind a corporation, the service of process must be upon the identical agent provided by statute: *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204; and the fact that the officers of a corporation may have known of the issuance of a writ does not dispense with the necessity of the regular service as provided by statute: *Harrell v. Mexico Cattle Co.*, 73 Tex. 612. In Michigan, service of process may be made upon the proper officers of a corporation in the county where the plaintiff resides, though its business office is located in another county: *Potter v. John Hutchinson Mfg. Co.*, 79 Mich. 207.

MISNOMER IN SUMMONS — EFFECT OF. — When the real party in interest is sued and served with process by a wrong name, the misnomer must be pleaded in abatement; otherwise such party will be concluded by the judgment, the same as if he were described by his true name: *Pennsylvania Co. v. Sloan*, 125 Ill. 72; 8 Am. St. Rep. 337; and the rule is the same, whether the defendant appears or makes default: *First Nat. Bank v. Jagers*, 31 Md. 38; 100 Am. Dec. 53.

MISSISSIPPI MILLS COMPANY v. SMITH.

[69 MISSISSIPPI, 299.]

WATERCOURSES — RIGHT BY PRESCRIPTION TO POLLUTE WATERS OF STREAM, HOW LIMITED. — The right acquired by prescription to pollute the waters of a stream is limited by the character and extent of the right exercised during the period of prescription, and for any increase causing material injury to the riparian owners an action may be maintained.

MANUFACTURER NOT EXEMPT FROM LIABILITY FOR POLLUTING STREAM BY ARTIFICIAL MEANS. — A manufacturing company has no more right than any other person to pollute, by artificial means, the waters of a stream, without liability to persons having a right to the use of the water flowing therein.

TESTIMONY COMPETENT FOR ANY PURPOSE NOT EXCLUDED ON GENERAL OBJECTION. — Where testimony is competent for any purpose, it will not be excluded on a general objection.

MEASURE OF DAMAGES FOR POLLUTING STREAM. — In an action to recover damages to a farm, caused by the pollution of a stream running through it, it is error to admit evidence of the difference between the value of the farm with the stream clear and its value with the stream polluted. But if the jury is instructed not to find, in any event, the difference in the value of the farm with an unpolluted and a polluted stream on it, and their verdict shows that they must have disregarded the incompetent evidence, the error will not be ground for reversal.

ACTION to recover damages. The plaintiffs recovered a judgment for \$250, and the defendant appealed.

J. S. Sexton, for the appellant.

R. N. Miller, for the appellees.

COOPER, J. The appellees brought this suit to recover from the appellant damages for polluting the waters of a small stream which runs across their lands. A map showing the location of the stream, and its several branches before it reaches the land of the appellees, seems to have been introduced in evidence in the court below, and several witnesses were examined in reference thereto; but this map is not in the record, and if it were, we would be unable to apply the testimony of the witnesses to it, because of the indefinite manner in which the locations are spoken of. It is manifest that this court can form no opinion of the meaning of a witness, when the bill of exceptions states only that "the witness explained the map to the jury," or testified that the stream entered the land of the plaintiffs "here" and runs "here," and that a ditch was cut "there" or might be cut "here," etc. While it may be true that the bill of exceptions contains all the

evidence given in the court below (except the map), if the word "evidence" be taken as referring only to spoken words, it is evident that it does not put this court in possession of all the facts upon which the jury acted. We have adverted to the defective character of the bill of exceptions here, not because it is material in this case, but because we have almost invariably found the same character of defect in cases where maps and plats are introduced in evidence since the introduction of the stenographic report instead of the ordinary bill of exceptions. If the practice is persisted in, some appellant will some day have an affirmance in this court on the ground that it is impossible to say what facts were developed in the court below.

The evidence in this case discloses that the plaintiffs are the owners of a tract of land through which a small stream of clear and pure water originally ran; that on one of the branches of this stream, above them, the defendant company erected a cotton and woolen mill more than twenty years ago, which mill is located at or near some springs from which this branch of the stream takes its origin. The defendant dug a pond about the springs, and dammed up the water they supplied, and with a large pump forced the water from the pond into its dye-house and through the closets in its mills. The water, having been used in flushing the closets and in dyeing the cloths manufactured, and washing the wool used by the company, is returned to the stream, below the pond, and from thence flows into the stream on the plaintiffs' land. This use of the water commenced more than twenty years ago, and has been continuous from that time to the present.

The plaintiffs, however, contended, and introduced evidence tending to prove, that until less than five years before the institution of this suit the stream below the pond was small and feeble, and its bed crooked and filled with large holes, in which the water would, to a great degree, stagnate, and deposit much of its impurity before reaching their lands; and also that the banks of the stream were not well defined, and in some parts of the defendant's land it spread out over a flat, on which much of the polluting matter was deposited; that the defendant, within that period, had, for the purpose of accelerating the flow of the water and preventing the deposits in the bed of the stream, on its land, or on the flat, dug a ditch, by which the channel of the stream on its land was straightened, the result of which was that the befouled water was has-

tened to the stream on the land of plaintiffs; that before this ditch was cut, the stream and flat on defendant's land was much polluted, and obnoxious to sight and smell, which was greatly obviated by cutting the ditch; that before the ditch was cut, plaintiffs suffered but little inconvenience or injury because of the pollution of the water, which came upon her land only in small quantities, except when the stream was flooded by rains, and quickly passed away; but that, since the cutting of the ditch, the foul and polluted water, continuously and in large quantities, was passed into the stream on their land, rendering its water unfit for any purpose and creating a stench throughout its course.

It was also proved, both by witnesses for the plaintiffs and defendant, that, within ten years before the suit, the defendant company had considerably increased its capacity and the number of its employees, by whom the closets were used; and that, for the purpose of securing an increased supply of water, the defendant had pumped and piped water from Ford's Creek, a stream over a mile away, the water from which would not naturally come through the plaintiffs' land; that this water from Ford's Creek was used for the same purposes as that taken from the pond, and after such use, was delivered through the ditch cut by defendant in the stream on plaintiffs' land.

The defendant's evidence tended to show that the water of the stream was less polluted than the plaintiffs claimed it to be; that the pollution was the same in character and less in degree than it had been at any time during the past twenty years, for, while the quantity of water had been increased, the polluting matter was less per gallon than before; that the ditch cut by it was only to straighten the stream on its own land, and did not have the effect, nor was it cut for the purpose, shown by the witnesses for the plaintiffs.

This statement of the material evidence fairly presents the facts upon which the plaintiffs contend that a right of recovery is shown, while the defendant claims that none should have been permitted.

The testimony of the plaintiffs and defendant, while in some respects conflicting, presents, in the main, substantially the same condition of affairs.

The defenses relied on by the defendant company are: 1. That a right to pollute the stream has been shown to exist by prescription; 2. That the use to which the water was put by

it was a reasonable one, in view of the character of its business, and that the right of an individual to have pure water must yield to the policy of the state and the public of encouraging great manufacturing establishments, which cannot exist if forbidden to befoul the water which it necessarily uses in its works, or to deliver it, when thus necessarily polluted, along the natural watercourses.

The plaintiffs, on the trial, conceded the right of the defendant to pollute the waters to the extent to which that right had been exercised until within five years of the commencement of their action, but contended that the right now claimed was materially different in character and degree from that which the defendant could exercise under its prescriptive claim.

Upon this point we think the law and the facts are with the plaintiffs, — at least, that upon proper instructions as to the law, the jury found a verdict for the plaintiffs, which is abundantly supported by the evidence. *Crossly v. Lightowler*, L. R. 2 Ch. 478, *McCallum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656, *Jones v. Crow*, 32 Pa. St. 398, and *Halsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, were all cases very similar in their circumstances to the case at bar. In each of them a right by prescription to foul the waters in which the plaintiff had an interest, by depositing dye-stuff therein, was claimed; in each, the right to somewhat pollute was claimed to warrant pollution to a greater extent. But the courts held that the right secured by prescription was limited by the character and extent of that exercised during the period of prescription, and that, for any increase causing material injury, an action could be brought. The facts of this case, as found by the jury, bring it within the rule announced in these cases.

In support of the proposition that the plaintiffs cannot recover in this suit because the water was polluted by a manufacturing company, and that the right of the plaintiffs must therefore be determined by a different rule than would be applied if the injury had been done by one not a manufacturer, the defendant relies upon the case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445.

That case had been before the supreme court of Pennsylvania on three previous writs of error, in each of which it had been determined that the plaintiff showed a right of recovery: 86 Pa. St. 401; 27 Am. Rep. 711; 94 Pa. St. 302; 39 Am. Rep. 785; 102 Pa. St. 370.

On the fourth writ of error, and upon substantially the same facts, a contrary conclusion was reached. But the decision on the last writ of error is, not that a manufacturing company, more than any other person, may pollute the waters of a stream without liability to others having a right to the use of the water flowing therein. On the contrary, the opinion is based upon the express declaration of the court that the character of the water had not been changed. The action was by Sanderson against the coal company for polluting the waters of Meadow Brook by discharging therein the waters from its mine. The court said: "It will be observed that the defendants have done nothing to change the character of the water or its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on the land artificially. The water, as it poured into Meadow Brook is the water which the mine naturally discharges. Its impurity arises from natural, not artificial, causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it."

The distinction between that case and this is apparent. In that, the mining company, in the ordinary use of its property, opened up a flood of water which, in its natural state, flowed into the brook, and, being naturally injurious, polluted the brook.

In this case the defendant company, using water in which it had a limited right, and to which the plaintiffs, after a reasonable use thereof by the defendant, had an equal right, by artificial means changed the very nature and character of the water, and instead of permitting it to flow to the plaintiffs in beneficial condition, poured it upon them, according to their witnesses, poisoned and putrescent.

For this a right of recovery manifestly existed, unless the defendant had acquired the right by prescription so to do. The verdict of the jury settles that claim against it.

The plaintiffs, over the objection of the defendant, were permitted to prove that the water from the stream had seeped into a spring near its border, rendering it unfit for use, and that, when it overflowed its banks, the adjacent land was rendered unfit for cultivation, and the crop thereon destroyed; that on one occasion a hog that had been in the stream was killed for meat, and its flesh found unfit for use; and probably other circumstances of like character. The objection taken to the

testimony was general, but we are now informed that the ground of objection is that no damages were claimed in the declaration for the injuries thus proved.

We do not think this testimony was introduced by the plaintiffs for the purposes supposed by the defendant. No effort was made to prove the value of the spring, or the hog, or the injury to the land or crops. The controversy of the parties was as to whether the water as polluted was poisonous and injurious. The plaintiff introduced much evidence to show that it was; the defendant, much to show that, though the water was discolored, it was wholesome, and fit for use by man and beast, many of its witnesses testifying that their stock were accustomed to drink it, and some that they themselves had done so. The testimony objected to was competent and relevant, not for the purpose of proving specific damages to be awarded by the jury, but as tending to show the harmful character of the water by reason of its pollution. The rule is well settled that where testimony is competent for any purpose, it will not be excluded on a general objection. If the defendant had desired to do so, he could have limited the effect of the testimony to the extent to which it was competent; but it is not permissible to reserve a general objection to such evidence.

The court should not have permitted the plaintiffs to prove the difference in the value of their farm with a clear stream on it and with that polluted as it was. The injury is not of a permanent character, and will not, in the course of nature, continue after its cause shall be removed. It must be assumed that the defendant will cease to infringe upon the rights of the plaintiffs, and if it does not, recovery must be had in successive suits. The error in the admission of this evidence would cause a reversal of the judgment but for the fact that by the tenth instruction given for the defendant the jury was instructed not to find, in any event, the difference in the value of the place with an unpolluted and a polluted stream on it, and the further fact that the meager verdict rendered was evidently reached by disregarding the incompetent evidence.

The judgment is therefore affirmed.

THE DÉBRIS QUESTION. — The deposit in a stream, or upon its banks, of waste matter from manufactories, or of *débris* from mines, which is necessarily carried down by the current and thrown upon the lands of riparian owners below, is a nuisance, and the parties injured thereby may sue for its abatement, to enjoin its maintenance, and to recover damages for the injuries

permit, and regulate mining on the public lands, or on lands granted by the United States to private owners. Nor are such acts authorized or justified by state statutes providing for the improvement of the navigable rivers of the state, although they recognize the existence of the injuries; or by state laws regulating mining operations: *Woodruff v. North Bloomfield Gravel Min. Co.*, 9 Saw. 441. Neither the United States nor the state could pass a law authorizing such an invasion of private property, or such an injury to the navigable waters of the state: *Pollard's Lessee v. Hagan*, 3 How. 223; *Boggs v. Merced Min. Co.*, 14 Cal. 279; *People v. Gold Run etc. Co.*, 66 Cal. 138; 56 Am. Rep. 80; *Woodruff v. North Bloomfield Gravel Min. Co.*, 9 Saw. 441. The covering up of land with *débris*, so as to effectually destroy or impair its usefulness, is a taking thereof within the meaning of the constitutional provision prohibiting the taking of private property without compensation to the owner: *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Baton v. Boston etc. R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147. Even in England, where Parliament can authorize nuisances, and the taking of private property without compensation, the courts are careful not to imply or infer authority to create nuisances when such authority is not clearly given by the express terms of the act, and it is held that bodies acting under acts of Parliament must confine themselves strictly within the powers granted: *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 153; *Clowes v. Staffordshire etc. Co.*, L. R. 8 Ch. 125; *Attorney-General v. Leeds Corp.*, L. R. 5 Ch. 583; *Attorney-General v. Council of Borough of Birmingham*, 4 Kay & J. 528.

CUSTOM CANNOT GIVE RIGHT TO DEPOSIT DÉBRIS IN STREAM — No right can be acquired by custom to cast *débris* into a stream, to be carried down and deposited upon the property of a riparian proprietor below, destroying and rendering it useless, or to fill up the beds of navigable streams, impeding or destroying navigation: *Red River Roller Mills v. Wright*, 30 Minn. 249; 44 Am. Rep. 194; *People v. Gold Run etc. Co.*, 66 Cal. 138; 56 Am. Rep. 80; *Woodruff v. North Bloomfield Gravel Min. Co.*, 9 Saw. 441. The defendants in the California cases above cited contended that their acts were authorized by the customs of miners in that state, which had been recognized, confirmed, and legalized by the legislation of the state and of Congress. The courts, however, decided that they were not so authorized by any valid custom or usage. McKee, J., in delivering the opinion of the court in the case of *People v. Gold Run etc. Co.*, 66 Cal. 138, 56 Am. Rep. 80, said: "Undoubtedly, the fact must be recognized, that in the mining regions of the state, the custom of making use of the waters of streams as outlets for mining *débris* has prevailed for many years; and, as a custom, it may be conceded to have been founded in necessity; for without it, hydraulic mining could not have been economically operated. In that custom the people of the state have silently acquiesced, and upon the strength of it mining operations involving the investment and expenditure of large capital have grown into a legitimate business, entitled, equally with all other business pursuits in the state, to the protection of the law. But a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people and destruction to public and private rights; and when it develops into that condition, the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner." The same principles have been applied in cases arising from the throwing of *débris* from saw-mills into streams: *Veazie v. Dwinel*, 50 Me. 479; *Gerrish v. Brown*, 51 Me. 256; 81 Am. Dec. 569; *Red River Roller Mills v. Wright*, 30 Minn. 249; 44

Am. Rep. 191; and in *Columbus etc. Coal Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528, to the casting of *débris* from a coal mine into a stream.

NO PRESCRIPTIVE RIGHT TO CONTINUE PUBLIC NUISANCE. — It is a well-established rule of law that no right to maintain or continue a public nuisance of any kind whatever can be acquired by prescription: Wood on Nuisances, sec. 76, 727; Cooley on Torts, 613; *Woodruff v. North Bloomfield Gravel Min. Co.*, 9 Saw. 441; *People v. Gold Run etc. Co.*, 66 Cal. 138; 56 Am. Rep. 80; *Pettis v. Johnson*, 56 Ind. 139; *Veasie v. Dwinel*, 50 Me. 479; *Rhodes v. Whitehead*, 27 Tex. 304; 84 Am. Dec. 631. And this rule applies to a suit brought by a private person who has sustained special injuries from a public nuisance, as well as to a suit brought by the attorney-general in the name of the people of the state. A public nuisance is not unlawful as to the whole public, and lawful as to its constituents, or a part of its constituents; it is absolutely and wholly unlawful: *Woodruff v. North Bloomfield Gravel Min. Co.*, 9 Saw. 441.

INCONVENIENCE NO GROUND FOR REFUSING TO ENJOIN NUISANCE. — Where the rights of a complainant are infringed by the maintenance of a nuisance, the fact that it will put the party sought to be enjoined to great inconvenience and expense is no reason for refusing to grant an injunction. This is a consideration with which the courts have nothing to do. They are bound to grant to the party seeking relief such relief as the law entitles him to receive, whatever may be the inconvenience to the defendant or to the general public: *Woodruff v. North Bloomfield Gravel Min. Co.*, 9 Saw. 441; *Attorney-General v. Council of Borough of Birmingham*, 4 Kay & J. 528; *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146.

DAM FOR IMPOUNDING MINING DÉBRIS. — In the case of *Hardt v. Liberty Hill etc. Co.*, 27 Fed. Rep. 788, it was decided that no dams for the impounding of mining *débris* erected in mountain streams should be held sufficient to protect riparian proprietors below, when the determination of their sufficiency rests upon the opinion of engineers apparently equally intelligent, and those opinions are at variance; nor upon any evidence not of the most unquestionable and satisfactory character. It was said in that case that it is not for the court to speculate upon the sufficiency of means adopted by trespassers for the protection of parties trespassed upon, or the sufficiency of such means to resist the action of the forces of nature, where the data for correct determination are uncertain and unreliable, and where an error of judgment is liable to work great injury to the latter.

LEWIS v. WHITE.

[60 MISSISSIPPI, 332.]

HOMESTEAD OF TENANT IN COMMON, CO-TENANT'S CONSENT NOT NECESSARY TO EXISTENCE OF. — A debtor occupying land as a tenant in common may have a homestead exemption therein, and, as against creditors, his co-tenant's consent to such occupancy is not essential.

HOMESTEAD EXEMPTION OF TENANT IN COMMON, EXTENT OF. — The claim to the homestead exemption in property held in common is regulated and bounded in extent and value, just as in other cases. The tenant in common has no floating claim to exemption in the entire estate. He is

protected in his occupancy of a homestead of proper quantity and value, but no further, and whatever interest he may have in the remainder of the common property may be seized and sold to satisfy the demands of his creditors in proper cases.

THE complainant in the court below filed his bill against the appellants, alleging that he was the owner in fee of an undivided one-sixth interest in a certain tract of land containing about 366 acres, and in a certain other tract of about 385 acres; that he was a married man and householder, the head of a family, and a citizen of the state, and that he was residing upon said lands, with the consent of all his co-tenants, except the heirs of his deceased brother, who were minors, and therefore incapable of giving their consent; that his one-sixth interest in all of said lands was less than the number of acres which he was entitled to hold under existing laws as a homestead exemption; that said lands were easily capable of division, and would have been partitioned, but for the minority of some of the owners. The bill further alleged that the defendant Lewis, as sheriff, under executions in favor of the other defendants against the complainant, had levied on his interest in all of said lands, and had advertised the same for sale. An injunction was asked to restrain the sale, upon the ground that complainant's interest in all the lands was exempt as a homestead. A demurrer to the bill was sustained, and the defendants declined to answer, whereupon a final decree was rendered in favor of the complainant, awarding a perpetual injunction, and the defendants appealed.

D. C. Bramlett, for the appellants.

J. H. Jones and H. S. Van Eaton, for the appellee.

WOODS, J. It has several times been said by this court, in general terms, that a tenant in common may maintain his claim to his homestead exemption in the common estate. The requirements of the litigation presented in this cause demand of us a fuller and more particular annunciation of the law governing cases of claims of homestead exemptions by one of the tenants in common in the undivided property.

1. The execution creditor has no concern with the title of the tenant in common whose estate he is seeking to subject to his demand. If the debtor has good title to an undivided interest in the common property, and has united with title actual occupancy, the creditor cannot assail the homestead rights of the exemptionist. If the debtor has no good title,

the creditor cannot be heard to complain that he is not allowed to sell that of which confessedly his debtor is not owner. The question of the title of the tenant in common to the exempt homestead is not involved. Whether he has or has not title cannot affect the rights of the tenant in common claiming his homestead in the common property.

2. The consent of the co-tenants to the occupancy of the homestead claimed is not essential to the successful maintenance of the homestead exemption in a contest with creditors of the homestead exemptionist. The debtor is found in the occupancy of the common property, and asserting claim to his homestead exemption in a part of it; if he has or has not the consent of his co-tenants, the creditor cannot complain. The want of title, or the want of consent by co-tenants to occupancy, in no way possible can affect the rights of the creditor seeking to subject the debtor's property to his demand. The remark in *McGrath v. Sinclair*, 55 Miss. 89, that, "perhaps the better rule is, . . . that the homestead may be acquired in the common property, with the consent of the co-tenant, which will be good against all other persons," contains an intimation which is unsound; and this unsound intimation is perfectly refuted in the reasoning of the court which immediately follows it. Said the court in that case: "It is the occupancy as a residence which the statute had in view, and intended to protect, rather than the title by which he held. The substance thereof is, that the creditors shall not break up the home and residence by a sale of such title as the debtor had. If the debtor refers his possession to a tenancy in common with another, and enjoys the occupancy in that right, it is no reason that he should lose his home because, as against his co-tenant, he has not an exclusive right, and could be compelled to make partition. These are matters between himself and his co-tenant."

3. The claim to the homestead exemption in property in common is to be regulated and bounded, in extent and value, just as in every other case. The debtor may claim and hold and have spared to him a homestead not exceeding in quantity 160 acres in the land occupied by him, and in value not exceeding two thousand dollars. If the claim set up shall appear to the creditor excessive in quantity or value, by proper proceedings he may have such excess, if shown to exist, subjected to payment of his debt.

The tenant in common who claims his homestead exemp-

tion in the estate in common has no floating claim to exemption in the entire estate, as must be seen from what has been already said by us. He is to be protected in his occupancy of the homestead of proper quantity and value, but no further. Whatever interest he may have in the remainder of the common property is salable in satisfaction of demands of creditors in proper cases. What this undivided interest in the remainder of the common estate may be, or may prove to be worth, is a matter of no concern in the examination of the subject now being considered. And so what the real interest of the debtor in the homestead exemption allowed him may now be worth, or whether it may hereafter prove valueless, comparatively, on partition with the co-tenants, are questions not involved. Whatever estate the debtor has in the common property outside of that part claimed as a homestead may be seized and sold; and whatever estate the co-tenants have in the part claimed as a homestead by the debtor, their tenant in common, remains unaffected, as between him and them, by the recognition and allowance of his homestead in the common property, in the contest between him and his execution creditor.

The decree of the court below must be reversed, because by it the appellee had greater relief afforded than he was entitled to ask or receive. The injunction should be made perpetual, in so far as a homestead, not excessive in quantity or value, may be claimed, and it should be dissolved as to the residue of the lands embraced in the bill of complaint. In order, therefore, that the necessary further proceedings may be had to meet the views herein announced, the decree will be reversed, the cause remanded, and leave given appellants to answer, if they shall desire to do so, within thirty days after mandate filed in the court below.

HOMESTEAD OF TENANT IN COMMON. — As to exemption from execution of property of co-tenants, see notes to *McCoy v. Brennan*, 1 Am. St. Rep. 593-595, and *Wolf v. Fleischacker*, 63 Am. Dec. 121. In the latter case, and in others referred to in these notes, it is denied that the statutes contemplate a homestead in lands held by co-tenants. To the same effect is *Bishop v. Hubbard*, 23 Cal. 514; 83 Am. Dec. 132. The above notes refer to authorities in which the opposite view is taken, and this doctrine is also adopted in the following more recent cases: *Thompson v. King*, 54 Ark. 9; *Wertz v. Merritt*, 74 Iowa, 683; *Bolton v. Oberne*, 79 Iowa, 272.

STATE v. STONE.

[69 MISSISSIPPI, 332.]

MANDAMUS, STATE OFFICER PERSONALLY LIABLE FOR COSTS IN. — Where judgment goes against a state officer in a proceeding against him by *mandamus*, he is personally liable for costs, like any other litigant; but if such costs were properly incurred, he has a claim against the state for reimbursement.

MOTION in the supreme court made by the attorney-general to invoke the judgment of the court as to whether the costs of the appeal in the *mandamus* proceeding against the auditor, which had been decided adversely to him, were taxable against him.

T. M. Miller, attorney-general, for the motion.

CAMPBELL, C. J. The question is, whether, in a proceeding by *mandamus* against a state officer in which judgment goes against him, he is personally liable for costs. He is certainly liable for costs, as any other litigant is. His position is that of an official trustee, and, like other trustees, is to be adjudged to pay costs, and has a claim on the state for reimbursement of his proper expenditure in this behalf, just as trustees have a claim on the trust fund they represent for reimbursement of all proper costs of defending their trust. This matter is not provided for by statute, as it well might be. It cannot be doubted that in all cases where litigation results from the action of its officer in an effort to subserve its interest, the state will save him harmless from costs adjudged against him; otherwise he might be deterred from proper litigation in the interest of the state. It would seem to be proper and wise to vest power in the courts (at least in the court of last resort) to render judgment for costs in all such cases against the state, if the court giving judgment shall certify that the course of the officer in instituting, prosecuting, or defending the proceeding was justifiable. In this way justice may be done to the officer, and the state saved from costs improperly incurred. The costs will be taxed against the person litigating, because no other judgment can be rendered, in the absence of a law providing for it.

MANDAMUS, ALLOWANCE OF COSTS IN. — In all proceedings by *mandamus*, the granting of costs to one party or the other is exclusively in the discretion of the court, and they may be awarded or refused, according as the equity or justice of the case require: *People v. Denmore*, 1 Barb. 557. In New Jersey, AM. ST. REP., VOL. XXX.—86

however, the right to costs is held to be entirely dependent on statute; and in *Hopper v. Freeholders of Berger*, 52 N. J. L. 313, costs were denied to relators who succeeded on a demurrer to an alternative *mandamus*, on the ground that the circumstances were not covered by the statute relating to this subject. Where the granting of costs rests in the discretion of the court, the allowance of such costs to the relator is not reviewable on appeal: *People v. Albright*, 23 How. Pr. 306; *State v. Judge of Kenosha County*, 3 Wis. 809. The general rule in *mandamus*, as in other proceedings, is, that costs follow the event of the suit: *Fox v. Whitney*, 32 N. H. 408. Under the Oregon code, the right of a plaintiff to recover costs does not depend upon his claiming or recovering damages, but he is entitled to costs as a matter of course upon obtaining the relief sought: *Bush v. Geisy*, 16 Or. 255. In New York, the court, upon awarding a peremptory writ of *mandamus*, does not grant costs against the judges of subordinate courts, or other public officers intrusted with the discharge of judicial duties: *Anonymous*, 19 Wend. 157; but will award costs where the judges, instead of obeying an alternative writ, make a return; for in such cases it is presumed they are indemnified by the party in interest: *People v. New York Common Pleas*, 18 Wend. 534. And in New Hampshire, where the court decided that a *mandamus* should issue against a justice of the peace, commanding him to make a copy of the recognizance entered into upon an appeal taken from a judgment rendered by him, it was held that costs should be allowed the petitioner: *Ballox v. Smith*, 31 N. H. 413. Where the term of a town officer expires while proceedings are pending, and an alternative writ of *mandamus* is sued out against his successor, the latter is not liable, upon judgment against him, for costs incurred before issue of the alternative writ: *Ferguson v. State*, 31 N. J. L. 289. Costs are not usually given on granting an alternative writ on motion: *People v. Supervisors of Columbia*, 5 Cow. 291; nor will the relator be entitled to costs, upon the granting of his application for a *mandamus* against a public officer, when it appears that the refusal of the officer to comply with the demand of the relator was conscientious and founded on reasonable grounds: *People v. Magg*, 5 Abb. Pr. 232. Where the notice of motion for a *mandamus* asks for costs, and the motion is denied, costs are awarded against the relator: *People v. New York Common Pleas*, 1 How. Pr. 222. So where the petition is withdrawn, the rule is to allow costs to the respondent, unless he is in fault: *Anonymous*, 31 Me. 591. If the relator, after suing out a *mandamus*, removes from the state between the issuing of the alternative and the peremptory writ, proceedings will be stayed until security for costs is filed; and it is no answer to the motion that the defendant, with knowledge of the removal of the relator, had moved in the cause on his part: *People v. Oneida Common Pleas*, 18 Wend. 652. Where the finding is against the defendant, but no mention is made therein of damages or costs, the omission may be corrected by the *postea*: *Ferguson v. State*, 31 N. J. L. 283.

STATE v. ALLEN.

[69 MISSISSIPPI, 508.]

PRINCIPAL AND SURETY — SECRET UNDERSTANDING BETWEEN, WHEN AVAILABLE TO ESCAPE LIABILITY ON BOND, AND WHEN NOT. — A secret undisclosed understanding by a surety in signing a bond will not avail to avoid liability, in the absence of any notice to the obligee of the violation of the condition by the principal; but with notice to the obligee, where the condition has been disregarded in such a manner as to increase the surety's liability, the surety will not be liable.

CO-SURETIES ON BOND RELEASED BY RELEASE OF SURETY WHEN. — Where a bond is signed by sureties upon the condition that it is to be circulated for other signatures, and not be delivered until signed by solvent sureties to a specified amount; and after sureties to that amount are obtained, the signature of one of them is erased by the principal, the condition and its violation being known to the approving authority before the approval of the bond, the sureties who signed upon such condition, but who did not consent to such erasure, will be thereby released.

SURETY SIGNING BOND ON CONDITION RELEASED WHEN. — Where a surety signs a bond upon condition that a certain other solvent surety will also sign it, he will be released, if, without his consent, after the bond is complete, but before its approval, such other surety is released by the principal; and the same result will follow, where the release of such co-surety results by operation of law from the act of the principal in erasing the names of other sureties who have previously signed.

NOTICE FROM ERASURE OF SURETY'S NAME ON BOND, EXTENT OF. — The erasure of a surety's signature from a bond, and of his name from the body of the bond, is sufficient to affect the approving authority with notice that the signing was upon condition that other sureties should also sign, and that this condition had been violated, since it is sufficient to suggest inquiry, which, if made, would lead to a knowledge of the facts.

ACTION upon the bond of Hamilton, Allen, and Hoskins, lessees of the state penitentiary. The facts appear from the opinion.

T. M. Miller, attorney-general, for the state.

John M. Allen, for the appellees.

WOODS, J. For the last time, this cause, which involves public and private interests alike, is before us for conclusive determination, upon the decisive plea of *non est factum*, interposed by all the defendants yet remaining in court.

This plea, which, under the rulings of the court below, must be understood to embrace all the matter sought to be set up in the further plea of defendants, numbered 10, avers in its essential parts that the bond sued on is not their act and deed, because they say, substantially, that, under the proviso to section 1, chapter 40, Laws 1880, the same being

entitled "An act to require the employment of convicts on works of internal improvement, and provide for the support of the penitentiary, without loss to the state," the board of public works, having first rejected all the bids received for the lease of the penitentiary, penitentiary property, and convicts for the term of six years, entered into a contract with J. S. Hamilton, J. A. Hoskins, and Robert H. Allen, constituting the firm of Hamilton, Allen, & Co., in July, 1880, whereby, in consideration of the sum of \$29,420, to be paid annually, the said penitentiary, property, and convicts were leased to said Hamilton, Allen, & Co. for the term of six years, upon the terms and conditions provided by law, and that said contract was properly executed by the respective parties thereto; that thereafter, as required by section 2 of said chapter 40, Laws 1880, the said lessees entered into a bond of the character of the one now sued on, the condition whereof was, that the said lessees should faithfully perform their said contract of lease; that the said section 2 of said chapter 40 requiring that said bond, so executed, should be approved by the board of public works, a form thereof was delivered to said Robert H. Allen, one of the lessees, to be circulated in the northern part of the state of Mississippi for signatures, with the understanding and upon the condition that after the said Allen had procured thereto as many signatures as he reasonably could, the said form of bond was to be returned to the defendants Hamilton and Hoskins at Jackson, there to be circulated for other and further signatures, and when such signatures, additional to those who had signed prior to their signing the same, should make up the penalty prescribed in the bond, to wit, one hundred thousand dollars, the said form of bond was to be signed by the principal obligors, the said lessees, and by them was to be delivered to the governor of the state, to be by him submitted to the board of public works for inspection and approval; that it was further understood and agreed that the form of bond, or bond, so circulated and signed as aforesaid, was not to be regarded by any of the sureties signing the same as a completed instrument unless and until it should be signed by other sureties, so as to make up the full penalty of the bond after it had been transmitted by the said Allen to the said Hamilton and Hoskins for that purpose (the sureties, as among themselves, signing for the amounts set opposite their names); that said bond, or form of bond, was not to be a completed instrument until all such

other sureties had signed the bond according to the understanding and agreement before set out, and until it had been signed by the principal obligors, and thereupon deposited with the governor of the state, as *ex officio* president of the board of public works, to be by him handed to the said board of public works for approval, as required by law; that among other sureties signing the bond after its said transmission to Hamilton and Hoskins for circulation for signatures of such other sureties, was one Philip Hart, a solvent surety thereon, and worth the penalty of the bond, and that after said Hart signed said bond, it was signed by R. Burdett, J. L. Hebron, and J. F. Townsend, as sureties also, and was thereafter signed by the principal obligors; that the said bond was signed by these defendants, as sureties, on the condition that it would not take effect as a bond, nor be a completed instrument, nor be delivered to the board of public works for approval, until the others signing, their co-sureties, would justify in an amount aggregating, with all the sums justified to by all the sureties, the full penalty of the bond, to wit, the sum of one hundred thousand dollars; that said Hart justified in the sum of \$——, Burdett and Hebron in the sum of eight thousand dollars each, and Townsend in the sum of ten thousand dollars, the several amounts justified to by all the sureties aggregating something more than one hundred thousand dollars, the penalty of the bond; that while all the sureties were yet on the bond, it having been finally completed according to the understanding and condition on which these defendants signed, and before the same had been approved by the board of public works, while it was in the hands of the governor, as president *ex officio* of the board of public works, or in the hands of the principal obligors, or one of them, and while wholly out of the possession and control of these defendants, the said governor, or the said principal obligors, or one of them, permitted the said Hart to withdraw from said bond by the erasure of his, Hart's, name in the body of the bond, in its signature, and in its "acknowledgment" (*sic*), at the request of Hart, and without the knowledge or consent of these defendants, or of any of the other sureties, including Hebron, Burdett, and Townsend, who signed after Hart, and that this erasure of Hart's name was made prior to its delivery to and approval by the board of public works; and that the board of public works thereupon, with full knowledge of the facts, and without the authority or consent

of the defendants, approved the bond, whereby the said Hebron, Burdett, and Townsend, as well as Hart, were released as the co-sureties of defendants, and whereby the amount for which the remaining sureties justified was reduced far below one hundred thousand dollars, and therefore that they are released from liability on said bond.

Besides this general plea, which we have stated with much fullness, one of the defendants joining therein, viz., John M. Allen, presented and asked leave to file his individual plea of *non est factum*, numbered, in the record, 11, in which, besides much that had already been presented by him and his co-defendants in the plea just largely recited by us, he averred that he was informed by Robert H. Allen, the principal obligor, who circulated the bond for signatures in North Mississippi, as hereinbefore circumstantially detailed, that the said J. F. Townsend would be his co-surety if he, John M. Allen, would sign the bond; that he knew Townsend, and knew him to be a man of large means, and that he signed upon the understanding (additional to the conditions stated in the general plea of all the defendants) that Townsend should become his co-surety, and become liable on the bond with said defendant, John M. Allen; that, with this additional understanding, John M. Allen signed, and that, as agreed and understood, said Townsend did subsequently sign, and justified in the sum of ten thousand dollars, but that Townsend and others had been released from liability upon said bond by reason of the erasure of the name of Philip Hart, as hereinbefore specifically narrated; that, moreover, after the bond had been signed by this defendant and a number of other sureties in North Mississippi, it was delivered to Robert H. Allen, one of the principal obligors, to be taken to Jackson and circulated for other signatures, until enough signers as sureties should be obtained to qualify before the examining officer, so as to make the several sums for which the sureties could and would justify aggregate the sum of one hundred thousand dollars; and that the bond, when so completed, and when signed by the principal obligors, was to be then, and not before, delivered to the board of public works for approval.

The court declined to allow this individual plea to be filed when it was offered, holding, as appears in its order thereon in the record, that "the defense sought to be set up could be made under the seventh plea on which issue was joined." It is sufficient, for the present, to say that, in the progress of the

trial, the course indicated by the learned judge in the court below was pursued, and evidence was offered, without objection, which tended to support this entire plea of said John M. Allen.

The issue joined thus was submitted to a jury, by which a special verdict was returned, embracing, amongst others not necessary to be mentioned, the following findings of fact, viz.: "We, the jury, agree and find that the erasure of the name of P. Hart was made from the bond sued on after the same had been signed by all the parties whose names appear thereon, including the principals, and that the erasure was made without the knowledge or consent of any other surety, except Green, at the request of Hart, by the aid or procurement of one of the principals, J. S. Hamilton, in whose hands the bond was before and after Hart signed, and before the same was delivered to the governor, and that the board of public works, when they were acting upon the bond, had their attention called to the erasure. We further find, if the plaintiff is entitled to judgment on this finding, its damages are assessed at the sum of \$44,082.11."

On this finding, the counsel for the state moved for judgment, but the Hon. Charles H. Campbell, judge of the fifth circuit court district, who had presided on the trial of the issue by interchange, having been called away before the jury returned the special verdict, and the presiding judge of the court, the Hon. J. B. Chrisman, feeling himself disqualified to make any order or render any judgment in the case, by consent, and to the end that an appeal might be had and the controversy determined in this court, the motion of the state for judgment was denied, and judgment entered for these defendants, and the same was accordingly done, the Hon. Charles H. Campbell finally signing the bill of exceptions at the request of counsel on both sides, in order that the case might reach this court on appeal.

1. The question first to be considered is this: Was the verdict responsive to the issue? and did it find all the material facts in favor of the defendants? In answer to the inquiry, it is to be said that the findings of the jury do not embrace any covering those parts of the plea which aver the understanding, agreement, or condition on which these defendants signed the bond when the same was being circulated for signatures. And though the record shows abundant evidence offered by the defendants to have warranted a finding of these particular

facts in favor of the defendants, and though the record demonstrates that the facts pleaded as to this understanding or condition of signing on the part of the defendants was not sought to be controverted, and is practically unassailed, and though on the record before us no other finding than one in favor of the defendants, on these averments of the plea, could be permitted to stand, and that a reversal on this ground would be a barren victory for the state if another trial should be awarded on the same facts, yet the proper determination of this contention would not be free from embarrassing difficulties if there were no other lights to guide us. But it is not to be forgotten that the judge who tried the case was not present when the jury returned this not completely responsive verdict, and that there was therefore no opportunity given for a more perfect response under fuller directions from an enlightened court. Of necessity, the special verdict was compelled to be received and entered just as the jury returned it.

We are bound, too, to suppose that the learned and able lawyers who have managed the cause on the respective sides saw and felt the full force of this view, and frankly met the exigency by an agreement embodied in the judgment of the court, which is in these words, viz.: "It being agreed between counsel, in open court, that, on appeal, said special verdict shall be considered with reference to the evidence, as well as the pleadings, and it is ordered that the clerk insert the same in the transcript when called for." Remembering the recognized ability and skill of the counsel who made this agreement, and had the same embodied in the judgment appealed from, we are forbidden, for a moment even, to entertain the thought that it was only meant that we should examine and consider the evidence in the usual manner. The merest tyro in the profession perfectly knows that in every case, where a bill of exceptions containing the evidence is taken and produced here, it is our duty to consider the same without a request, much less an agreement of counsel to that effect.

To arrive at any correct interpretation of the language employed by counsel in this agreement, we are to bear in mind that the cause had been thrice tried in the court below, and twice heard before us on appeal; that in this long and fiercely contested struggle every contention had been determined, or had been eliminated, except the issue presented by these defendants in their plea of *non est factum*; that final judgment had already been rendered against the principal obligors; that

Hart, Hebron, Burdett, Townsend, and perhaps others, had been released by inexorable legal necessity; that the issue at last made by these defendants had been imperfectly responded to by the special verdict of a jury, under most embarrassing circumstances; and that the whole case, on all the pleadings and multitudinous proofs, should be finally ended, if possible, by this court, on a last appeal. We take it to be true, that by this agreement of counsel we are to examine this evidence in all its parts and in its entirety, and give it such effect as in law it is fairly entitled to, regardless of mere technical and formal requisites, and that if the evidence satisfies us that on the point now being considered the jury could not have found against the defendants, and that a reversal for the third time in this court would be an idle and fruitless determination, then we shall consider that as found by the jury which should have been found, and proceed to examine the case on the real question presented in the record submitted to us. This is our understanding of the agreement,—an agreement eminently wise and honorable to counsel, under the circumstances, we do not hesitate to affirm. Acting on this, our understanding, and looking at all the evidence in the record, we have no hesitation in declaring that the understanding and condition averred in the plea to have existed at the time defendants signed the bond are conclusively shown to have existed, as averred in the pleading.

We come now to consider the materiality and sufficiency of the defense presented by these defendants by their plea of *non est factum*. We have here a case freed from all difficulty, growing out of the necessity of an assumption by the court that the complaining sureties signed the bond, according to custom, while it was in the care of the principal obligors, with an understanding that the bond was to be circulated for additional signatures, until sufficient solvent sureties in number and amount should sign and justify in the aggregate for the full penalty of the bond. There is no occasion for resort to the reasonable presumption that these defendants signed with the understanding that others, sufficient in number and amount, would become their co-sureties, and that when the bond, in its full penalty, had been properly signed by their co-sureties, and by the principal obligors, it should then be regarded as completed, and should, in that condition, be delivered to the approving authority. The plea distinctly

avers these conditions in express terms, and we have already said that the evidence supports the averments of the plea.

This, then, is the case of a bond signed by the defendants on the understanding and condition that the instrument should be circulated for other and further signatures, and should not be regarded as completed, and should not be delivered to the approving authority, until other solvent sureties should be obtained, who could and would justify, respectively, in such amounts as, added to the amounts set opposite the signatures to the bond of these defendants, would make, in the aggregate, the full penalty of the bond, to wit, one hundred thousand dollars. We have this, also: the bond was circulated further by the principal obligors, or some of them, for signatures of solvent sureties thereon, according to this express understanding and condition, on which these defendants consented to sign and become liable, and that additional sureties were found and their signatures obtained to the bond, and that, still in pursuance of the distinct agreement made with these defendants, these additional co-sureties separately set opposite their respective signatures the amounts they were willing to justify to, and that the total amounts thus justified to by all the securities amounted to something more than the penalty of the bond, viz., one hundred thousand dollars.

According to the condition of signing by these defendants, the bond was now completed, and was ready for delivery to the approving authority; the defendants were bound, with other sufficient solvent co-sureties, in the full penalty of the bond, the whole number of the securities, as among themselves, having set opposite their respective signatures the several amounts to which they could and would justify, and to which, in fact, they did respectively justify.

While in this completed condition, and ready for delivery, according to the condition on which these defendants signed, the name of P. Hart, one of the additional co-sureties, was erased by drawing a pen-line through the signature, and where it appeared, with those of all the other sureties, in the body of the bond, and in the jurat. All this was done at Hart's request, by one of the principal obligors, before the delivery of the bond to the approving authority, and without the knowledge or consent of any of the other sureties, either those signing before or those signing after Hart. In this altered condition, the bond was delivered to the board of public works,

the attention of the board called to its then condition, and the same then approved.

In this connection it is well to remark that the suit was originally against all the sureties, Hart included. In the progress of the protracted litigation, however, Hart's non-liability being made manifest, the suit was dismissed as to him; and in the further progress of the cause, the non-liability of Hebron, Burdett, and Townsend being made manifest, — they having signed after Hart, and before the erasure of his name, and in reliance upon him as their co-surety, — they, too, were discharged and released from liability.

It is not contended by counsel for appellees that the violation of a secret condition, on which sureties sign, by the principal, to whom the instrument has been intrusted by the earlier signers, will avail to release the sureties whose principal has been thus trusted by them, and who has disregarded the trust reposed in him without notice to the approving authority of the limitation upon the power of the principal, and of his violation of the condition creating this limitation; and, on the other hand, it is not contended by the counsel for the state that those signing as sureties upon the understanding and condition that a particular person shall become their co-surety will not be discharged from liability upon the bond so signed, if, afterwards, this particular person with whom they were willing to be bound shall actually sign, and subsequently his name shall be erased without their knowledge or consent. The reason is near at hand, and is stated by the state's attorney-general, viz., the face of the altered bond would itself give notice of the facts and conditions.

The statement of these admitted propositions demonstrates how much nearer together the learned counsel are in a correct and harmonious apprehension of the law than would be inferred from a glance at the great record before us. The two propositions, taken together, are a very fair epitome of the law applicable to the case at bar. Blended, they harmonize perfectly, and thus blended and properly amplified, they meet the necessities of the issue before us; and they are supported, not alone by reason, — the highest authority, — but by an unbroken line of carefully considered precedents in every court of last resort, state and federal, in the United States, with one solitary exception, so far as protracted and repeated examination enables us to say.

The secret condition by which a person signing as a surety

undertakes to protect himself cannot be successfully pleaded. By relying upon a secret condition with the principal obligor, the confiding surety has made it possible for his agent, the principal obligor, to mislead or defraud, and if loss shall befall by reason of the trusted agent's disregard of the secret condition, that loss must be borne by the too confiding surety. The loss must be placed upon him whose trust in another made it possible for it to occur. In this class of cases, as in all others in life, he who trusts most must suffer most. The law is, that the surety who undertakes, upon a secret understanding with his principal, to be bound for him and with him must be held liable upon his principal's default, even though the principal disregard and violate this secret condition, to the loss and damage of the too trusting surety. But it is equally the law, and the complement of the announcement just made, that if this secret condition is brought to the notice of the beneficiary in the instrument, or to the notice of the authorized agent of the beneficiary, and notice is had by the beneficiary, or his agent, of the departure from the condition by the principal, to whom the instrument has been intrusted, then the beneficiary, having it in his power to protect the surety as well as himself, if he act with prudence, after notice, cannot hold such surety liable, if he receive and rest upon the bond signed upon condition by the surety, with condition broken by the principal, and notice thereof to the obligee in due time. In other words, a secret, undisclosed understanding by a surety in signing a bond will not avail to avoid liability, in the absence of any notice to the obligee of the violation of the condition by the principal; but with notice to the obligee, certainly where the condition has been disregarded in such manner as to increase the surety's liability, the surety is not liable.

It is admitted that if these defendants had signed the bond on condition that Hart should become their co-surety, and Hart had subsequently in fact become their co-surety, the defendants would not be liable, if, afterward, Hart's name had been erased from the bond and he discharged without the knowledge or consent of the defendants. What substantial distinction can be drawn between this admitted case and the real case in hand? Enlarge the imaginary case of the state's counsel, and let us suppose that the defendants signed with the understanding that Hart, Hebron, Burdett, and Townsend should become their co-sureties, and that they did actually

become so, and subsequently all their names had been erased, all the sureties would clearly be released from liability. In such case the condition is found, the violation of the condition is found, the increase of the liability of the remaining sureties is found, and notice of all these things, by reason of the erasures of the names, is found. On principle, how can this supposed case be distinguished from the real case? In the real case the defendants signed on the understanding and condition that enough other solvent persons should sign for such amounts as they could justify to, which, added to the amounts justified to by these defendants, would aggregate the full penalty of the bond; these other solvent sureties, sufficient in number and amounts, do accordingly actually sign, but, after the bond had been completed in accordance with the original agreement between the defendants and one of the principal obligors, to wit, R. H. Allen, one of these added co-sureties, a solvent person, who had justified, as appeared on the face of the bond, for five thousand dollars, has his name erased in the body, in the signature, and in the jurat to the bond, and thereby this retiring surety is released from liability. But, as perfectly appears from the record, by the inexorable logic of law, all the other solvent sureties signing after Hart have been released by virtue of the release of the one whose name was erased, the liability of these defendants largely increased, and notice on the face of the bond given, which, if followed up, would have disclosed the facts and the consequences flowing from them, as they now are plainly to be seen. We ask again, in reason and on principle, what is there to distinguish the supposed case from the real case at bar? In the former case, four certain named persons are to sign with these defendants; in the latter case, enough solvent persons are to sign with the defendants, in sums sufficient to make the full penalty of the bond. In the first case, all four named sureties are discharged from liability by reason of the erasure of the name of one of that number first signing, and those signing in reliance upon the four thus released must likewise be conceded to be released. Why shall not the like result follow the discharge of all the additional solvent sureties by reason of the erasure of the name of the first solvent surety signing?

It seems clear to us, that after the bond had been completed as agreed and conditioned by these defendants, and before it had been approved by the board of public works,—

indeed, before it had been delivered to the board for approval,—a material alteration in the same was made, whereby the liability agreed to be assumed, and actually assumed, by the defendants had been largely increased without their consent, and with notice of this alteration to the approving authority, and the defendants are released from liability, unless they can be held, as insisted by the state, on another ground, to wit, the want of notice of the understanding and condition of defendants signing.

This view of the principal contention in the case at bar is in perfect harmony with the spirit and reason of the overwhelming current of adjudicated cases in the state and federal courts in this country. In some, the facts are strikingly similar to the case before us; in more, in nearly all, the spirit and reason of the decisions are the same. We content ourselves with citing a few out of the great number examined. See *Smith v. United States*, 2 Wall. 219; *Smith v. Weld*, 2 Pa. St. 54; *Dickerman v. Minor*, 48 Iowa, 508; *State v. Craig*, 58 Iowa, 238; *State v. McGonigle*, 101 Mo. 358; 20 Am. St. Rep. 609; *State v. Churchill*, 48 Ark. 426; *Agawam Bank v. Sears*, 4 Gray, 95; *Commissioners v. Daum*, 80 Ky. 388; *Graves v. Tucker*, 10 Smedes & M. 9; *Nash v. Fugate*, 24 Gratt. 202; 18 Am. Rep. 640; 32 Gratt. 595; 34 Am. Rep. 780; *McCormick v. Bay City*, 23 Mich. 457.

On this branch of the case, it is now to be added that the surety John M. Allen signed on the conditions named in the general plea of himself and all the others appellees, and that, besides, he shows that he signed with the understanding that one of the additional signers to the bond, J. F. Townsend, was to be his co-surety. It will be remembered that Townsend actually signed as agreed, and that signing after Hart, and prior to the erasure of Hart's name, he has been unavoidably released from liability, and the suit dismissed as to him by reason of Hart's release, on whose co-suretyship he, Townsend, relied, and on which he had the right to rely, the erasure of Hart's name being conceded to be notice to the approving authority of the condition on which Townsend signed. With Hart discharged by pitiless legal necessity, and with Townsend discharged by the same inexorable authority, because of his reliance on Hart as his co-surety, are we not driven irresistibly to the conclusion that John M. Allen is released by the same imperious necessity?

If John M. Allen must be held released, as we say he must,

how shall the other defendants who signed after him, relying on his co-suretyship, be held? It is impossible to find any satisfactory answer to the inquiry.

We have already remarked that there appears to be one discordant note in the universal voice of adjudication. The laborious research of the attorney-general of the state has produced many authorities bearing upon this particular subject, but a careful examination of them, with others unearthed in our own researches, produces the one solitary disagreeing view of the law. That is the case of *Wilmington etc. R. R. Co. v. Kitchin*, 91 N. C. 39. The learned counsel concedes with caution that the court, in that opinion, goes too far in holding a surety liable who would seem to have been not liable by the universal juridical judgment outside of the state last referred to. The Kitchin case is in violent conflict with the views herein advanced, and in irreconcilable antagonism to the long line of authorities hereinbefore noted. The doctrine of the Kitchin case has been well declared, by another court of last resort in commenting on it, to be unsupported by precedent, and wanting in that strength of argument which gives power to the general rule.

There remains only to be considered the reach and value of the notice afforded to the board of public works by the erasure of Hart's name, to which, confessedly, their attention was directed by the governor of the state when the bond was submitted for approval.

If we understand the state's position on this point, the contention is, that the erasure of Hart's name, appearing thrice on the face of the bond, was notice which required inquiry by the board of public works into the circumstances of Hart's connection with the other sureties, or what understanding they had with reference to him. We have already endeavored to demonstrate that though the agreement of these defendants was not to sign with Hart by name, their agreement was to sign with other solvent sureties, and that Hart was accordingly secured as one of these contemplated solvent additional co-sureties, and afterwards released by the erasure of his name, whereby the other additional solvent sureties, Hebron, Burdett, and Townsend, were also released, and that the legal liability of the appellees is not other than it would be if Hart, by name, had been agreed upon as their co-surety.

We conclude, therefore, whatever would have been notice

to the board of public works if Hart had been agreed upon by name as a co-surety, will be notice, also, under the averments of the plea and the evidence in the case. It will not do to assume that if inquiry had been made by the board of public works, the simple facts that the defendants signed the bond for circulation, and that they had no understanding with regard to Hart, and that he merely signed and then withdrew, would only have been discovered. That is the ground taken by the state, but its untenableness is demonstrable in a breath. The inquiry would have ascertained what the state admits; but unless reason and law had been deaf and blind, it would have necessarily appeared also, in connection with the fact that the appellee signed the bond for circulation, that they coupled their signing with an express condition, and this condition was as readily ascertainable as the other fact of their signing for circulation, which, it is admitted, inquiry would have disclosed; and while inquiry would have disclosed the fact that the appellees had no understanding with regard to Hart by name, the same inquiry would have disclosed the fact that they did have an understanding with reference to Hart and others as solvent co-sureties, and that the appellees were not consenting to Hart's release. Inquiry would with equal certainty have disclosed that Hebron, Burdett, and Townsend, the other co-sureties signing after Hart, signed relying on him as their co-surety, and that they were not consenting to his release. As is said, with a touch of grim humor, by counsel for appellees, "there is no telling what inquiry would not have ascertained."

It might as forcibly be contended for the state that the erasure of Hart's name was only notice of that fact. That is not the position of the state's counsel, of course, but we think such ground might be as well defended as the position taken, which would cut off inquiry as soon as begun. If the doctrine of notice is not to be emasculated, we must continue to hold that whatever is sufficient to give notice to a party is notice of everything which inquiry, if made, would disclose.

On the question of notice specifically, our own court has long acted on this definition of notice, nor are we aware of any restrictive qualification put upon it elsewhere. This idea of the reach and value of notice underlies all the cases in which sureties have been released by erasures of names, or other alterations appearing upon the face of an instrument on which recovery is sought. It seems superfluous to say more:

See 16 Am. & Eng. Ency. of Law, 792, and note, with the countless cases therein cited; *Parker v. Foy*, 43 Miss. 260; 5 Am. Rep. 484; *Buck v. Paine*, 50 Miss. 648; *Plant v. Shryock*, 62 Miss. 824.

Affirmed.

BONDS, CONDITIONAL EXECUTION OF: See note to *Guild v. Thomas*, 25 Am. Rep. 706-711. As to validity of bonds not signed by all who were expected to sign, see note to *Sharp v. United States*, 28 Am. Dec. 679-681. Where the obligee has no notice of the conditions, and there is nothing in the bond or the manner of its execution to put him on inquiry, the sureties are not released by the non-fulfillment of the conditions: *Taylor County v. King*, 73 Iowa, 153; 5 Am. St. Rep. 666, and note.

NOTICE FROM ERASURE OF SURETY'S NAME ON BOND. — Where a surety signs an attachment bond on condition that a certain person, whose name is written as co-obligor therein, shall sign it as co-surety, but who, when the bond is presented to him, refuses to sign it, and his name is erased and another's substituted therefor, without the consent or knowledge of the first surety, the fact that a certain name is on the bond is sufficient to put the parties on inquiry, and the erasure of that name and substitution of another so changes the obligation as to make it cease to be the bond of the first surety, and releases him from obligation thereon: *Hessell v. Johnson*, 63 Mich. 623; 6 Am. St. Rep. 334. In the note to this case are cited several others in the series relating to this subject. But to exonerate the surety, there must be something more than a mere expectation that a co-surety will sign: *Whitaker v. Richards*, 134 Pa. St. 191; 19 Am. St. Rep. 684.

FAISON v. ALABAMA AND VICKSBURG R'Y Co.

[69 MISSISSIPPI, 509.]

CONNECTING CARRIERS, PRESUMPTION OF LOSS OF FREIGHT ON LINE OF LAST ONE. — Where goods are shipped in cases over several lines of carriers, upon through bills of lading, and upon arrival at their destination one of the cases is missing, in an action to recover for the loss, brought against the last carrier, the burden is upon him to show that the loss did not occur on his line, even though he is an independent carrier, having no partnership connection with the others. The presumption that the loss occurred on the line of the last carrier is not overcome by proving that the car came under the seals of the preceding carrier, and that it had no end windows, it not appearing that the seals were sufficient to bar all access to the car, or that they remained unbroken throughout the journey, and it not being shown how, when, or where the case was lost, and it appearing that one of the other cases had been somewhere recovered.

ACTION to recover the value of a case of goods. The appellants were consignees of four cases of dry-goods shipped on a through bill of lading from Philadelphia, Pennsylvania, to

Vicksburg, Mississippi. The shipment was received in good order at Philadelphia by the Virginia, Tennessee, and Georgia Air Line, which issued the through bill of lading. The defendant was admitted to be an independent line, not acting with the other carriers under any partnership arrangement. The case was, by agreement, tried by the court, and judgment was rendered for the defendant. The other facts sufficiently appear from the opinion.

Brame and Alexander, for the appellants.

Nugent and McWillie, for the appellee.

CAMPBELL, C. J. As the defendant was the last of successive carriers having independent lines of carriage, but carrying continuously in pursuance of through bills of lading, and the car containing all the boxes at Chattanooga, where, according to the evidence, they were last seen, afterwards came to the possession of the defendant, it devolved on it to show that the missing box was not in the car when received by it. The evidence warrants the belief that all the cases or boxes were delivered at Chattanooga to the Alabama Great Southern Railroad Company, and put in a car, which is alluded to as having been "sealed," and probably was, and this car was received by the defendant at Meridian, but when, and in what condition as to seals or contents, is not shown. One box or case of goods was missing at Vicksburg, on the arrival and opening of the car there. When, or where, or how the box got out of the car is not shown. The argument is, that as the car was "sealed" at Chattanooga, and as it had no "end windows," there was no way of getting at its contents *en route* without breaking the seals, and it must be assumed that one of the boxes was not in fact delivered to the connecting road at Chattanooga, and therefore did not come to the possession of the defendant. If this argument were supported by the evidence, a different question would be presented; but it is not supported by evidence. It is not shown that the car was sealed at Chattanooga so as to deny access to its contents without breaking the seals. It is not shown that the seals remained as put on. All is conjecture and unsatisfactory inference as to that. It does appear that nearly two weeks elapsed after the delivery of the goods at Chattanooga and their arrival at Vicksburg, and the car is not accounted for during that time; and it is shown that somewhere one of the cases or boxes was "re-

coopered." There is no hint that this occurred before delivery of the goods at Chattanooga. It must be assumed that it was done after delivery at Chattanooga. To do this, it was necessary to get at the case or box. This may have been done after the car came into the hands of the defendant. It was for it to show that it did not. It failed to exculpate itself by overthrowing the presumptions against it, and must be held liable for the loss, which may have occurred on its line of carriage.

The judgment should have been for the plaintiffs, and the judgment rendered will be reversed, and cause remanded for a new trial.

CONNECTING CARRIERS — LIABILITY OF LAST CARRIER — BURDEN OF PROOF. — In an action against the last of a connecting line of carriers to recover for the loss of goods shipped on a through bill of lading, the presumption prevails that the contents of the car delivered to the last carrier were the same and the goods in the same condition as when started by the first carrier; the burden is then on the plaintiff to show that the loss occurred during transit, and when this proof is produced, the burden is then on the carrier to show that the car and its contents are in the same condition as when started by the first carrier, or when delivered to him: *Cooper v. Georgia Pac. R'y Co.*, 62 Ala. 329; 25 Am. St. Rep. 59, and note.

WESTERN UNION TELEGRAPH COMPANY v. JONES.

[69 MISSISSIPPI, 658.]

VERDICT NOT OBJECTED TO NOT DISTURBED ON APPEAL. — Where no motion is made in the trial court to set aside a verdict, the supreme court will assume it to be correct, and will not disturb it, if there is no error in the rulings of the court specially excepted to during the trial.

TELEGRAPH COMPANY BOUND TO SEND MESSAGE NOT WRITTEN ON ITS BLANKS WHEN. — Where a message is received by the operator of a telegraph company and paid for by the sender, the company is bound to transmit it, although it is written on paper other than its usual blanks.

TELEGRAPH OPERATOR BOUND TO KNOW TO WHAT PLACES MESSAGES CAN BE SENT. — It is within the apparent scope of a telegraph operator's agency to know to what places a message can be sent; and if he receives a message to be sent to a place through which the company's line runs, and takes payment for it, agreeing to send it, the company will be liable for failure to transmit and deliver it, although it has no office or agent at that place.

FAILURE TO DELIVER TELEGRAPH MESSAGE, EVIDENCE INSUFFICIENT TO EXCUSE. — In an action against a telegraph company for failure to transmit and deliver a message, evidence that the operator, upon ascertaining that the company had no office at the place to which it was to be sent, procured it to be sent by telephone, is inadmissible to establish a defense, where the telephone message was not delivered.

STATUTORY PENALTY FOR FAILURE TO TRANSMIT TELEGRAPH MESSAGE APPLIES WHEN. — The penalty prescribed by statute for failure to transmit and deliver telegraph messages promptly applies in every case where the company is under an obligation to do these things.

ACTION by the appellee to recover damages from the appellant for its failure to transmit and deliver the following message sent by her: "To Patsie Greenwood, Clinton, Miss.: Ella died last night. Send wagon. Have grave dug." Ella was plaintiff's little daughter, and Patsie Greenwood her older sister. The message, which was written on ordinary paper, was received without objection by the defendant's operator at its office at Jackson, who took payment therefor and promised to send it promptly. The defendant's line ran through Clinton, but it had no office and kept no operator there. These facts were not known to the operator at Jackson when he accepted the message, and when he ascertained them he procured the manager of the public telephone office at Jackson to send the message to Clinton by telephone. The message, if sent, was never delivered. Part of the damages claimed was for the burial expenses of the plaintiff's child. The court excluded evidence as to the burial expenses, but overruled objections to the original telegram, made on the ground that it was not written on the company's blank. It also excluded evidence offered by the defendant to show that the message was forwarded by telephone. The court instructed the jury that the defendant's failure to transmit and deliver the message under the circumstances in evidence made it liable for the statutory penalty of twenty-five dollars and the cost of the telegram. But the jury disregarded this instruction, and returned a verdict for \$50.40. The defendant appealed upon a special bill of exceptions, setting forth the evidence and the rulings of the court upon the trial.

Mayes and Harris, for the appellant.

M. M. McLeod, for the appellee.

CAMPBELL, C. J. There is no error in the rulings of the court on the trial of this case, and as the result reached was not complained of in the circuit court, but was acquiesced in for the purpose of entitling the defendant to appeal to this court and test the correctness of the rulings of the judge, we will not disturb it. We assume that the verdict is right, since no motion was made to set it aside, and we find no fault with the action of the court specially excepted to.

The fact that the message was written on paper other than the blanks usually employed made no difference, since it was received and paid for as a message to be sent; and the fact that the company had no office or agent at Clinton is not an excuse for failure to transmit and deliver the message received by its agent, and paid for as such. It was peculiarly within the apparent scope of the agency of the company's agent at Jackson to know to what places messages could be sent; and having received the message to be sent to a place where the company had a wire, the company was liable for the failure to transmit and deliver, according to the contract with the sender.

If the agent who received the message for transmission, not knowing that Clinton was a place at which the company did no business, had sought the plaintiff on learning his mistake, and had informed her of it, and returned her the money paid him, a different question would have been presented; but he did not do this; and recognizing his obligation to send the message, did it by telephone, which was offered to be shown as an excuse for the non-delivery complained of. There was no error in excluding the proposed evidence of the transmission of the message by telephone, as its non-delivery was the cause of complaint. If it had been promptly delivered to the person to whom it was addressed, all ground of complaint would have been prevented.

The penalty prescribed by statute for failure to transmit and deliver messages promptly applies in every case in which there is an obligation to do these things.

Affirmed.

TELEGRAPHS — LIABILITY FOR FAILURE TO DELIVER MESSAGE — KNOWLEDGE OF AGENT. — A telegraph company cannot excuse itself for failure to deliver a message on the ground that the office at the place of delivery was closed: *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843,

TELEGRAPHS — MESSAGES — WHETHER MUST BE WRITTEN ON BLANKS OF COMPANY. — It is common knowledge that messages are required to be written, and in the absence of proof of a custom by a telegraph company to receive for transmission messages orally delivered to an operator, the failure to send such a message is not a ground for recovery against the company: *Western Union Tel. Co. v. Dozier*, 67 Miss. 288. The delivery to a telegraph operator of a message, not on the usual blank of the company, without the payment of charges, or anything being said about sending the message, is insufficient to create a liability against the company for failure to send such message: *Western Union Tel. Co. v. Liddell*, 68 Miss. 1. See also note to *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 490.

TELEGRAPHS — RECOVERY OF STATUTORY PENALTY FOR DELAY OR FAILURE TO DELIVER MESSAGE. — The penalty imposed by statute for the failure of a telegraph company to deliver a message intrusted to it may be recovered without alleging or proving damages: See note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 790. The statutory penalty provided by statute is not a part of an entire demand for damages, and its recovery in a separate suit will not bar an action for damages for neglect or failure to transmit or deliver the same message: *Wilkins v. Western Union Tel. Co.*, 68 Miss. 6. Under the act of 1885, a telegraph company is not liable for the penalty prescribed, where the only wrong proved is a negligent one: *Western Union Tel. Co. v. Jones*, 116 Ind. 381. See *Western Union Tel. Co. v. Ward*, 23 Ind. 377; 85 Am. Dec. 462, and note on this point.

LOUISVILLE, NEW ORLEANS, AND TEXAS RAILWAY COMPANY v. DOUGLASS.

[69 MISSISSIPPI, 723.]

MASTER NOT LIABLE FOR ACT OF SERVANT NOT ENGAGED ABOUT MASTER'S BUSINESS. — A master is not liable for the wrongful act of his servant, unless such act was done by the servant while he was engaged about his master's business. Where, therefore, a baggage-master on a railway train, at the solicitation of the express-messenger, leaves his own compartment and goes into that of the express-messenger, and while there so terrifies a boy who is riding in that part of the car that he jumps from the car while it is running at a high rate of speed, and is killed, the railway company is not liable for the wrongful act of the baggage-master, unless it was done while he was about the company's business and in the performance of some duty with respect to the boy.

EXPRESS-MESSENGER, RAILROAD COMPANY NOT LIABLE FOR WRONGFUL ACTS OF. — An express-messenger on a railway train is not the servant of the railroad company, and the company is not, therefore, liable for his wrongful acts.

ACTION to recover damages for the death of the minor son of the appellee. The deceased, a colored boy about sixteen years of age, entered the express-compartment of one of the appellant's cars just as the train was leaving the station. After the train started, the express-messenger called the baggage-master of the company to come in from his apartment of the car to have some fun with the boy, saying, "Come here; I have a damn coon in here, and we will have some fun." Their acts and words so terrified the boy that while their backs were turned, he jumped from the car while the train was running at a high rate of speed, and received injuries from which he died in a short time. More than enough money to pay his fare to his destination was found in his pocket. He had

no ticket. The baggage-master had no authority to eject persons from the train, and the conductor, who had such authority, knew nothing of the occurrence until the baggage-master reported it to him. The plaintiff recovered judgment, and the defendant appealed. The following are the instructions given for the plaintiff, which are referred to in the opinion: "6. That if they find from the evidence that plaintiff's son was a minor, and that, in October, 1890, said minor boarded the train of defendant at Tunica, Mississippi, for the purpose of being carried to Lake Cormorant, Mississippi, and that in boarding said train, got into the express department of the car belonging to defendant's train, and that when he got into the said department of said car, the express-messenger called to the baggage-man of the train to come in there, that he had a 'coon' in there, and they would have some fun, and the baggage-man went to the express department of the car, and then he and the express-messenger wantonly, willfully, and recklessly, by their actions and their language, induced said minor to believe and fear that they were going to inflict upon said minor severe corporal punishment, or do him bodily harm and injury, and that by reason of such fear, and to escape said punishment or injury at the hands of said express-messenger and baggage-man, said minor leaped from the car while it was running at a great speed, and sustained injuries from which he shortly died, then the jury will return a verdict in favor of plaintiff, giving him such damages as they may see meet and proper to give, according to the instructions heretofore given by the court in this case as to said damages. 7. If the jury believe from the evidence the facts in this case to be as set out in the foregoing instruction, then they are instructed to find for the plaintiff, and assess his damages above indicated, even should they further believe from the evidence that said minor was a trespasser on said train at the time he leaped therefrom, and had no lawful right thereon. 8. The court further instructs the jury that if they find from the evidence the facts in this case to be as above set out, then they will return a verdict for the plaintiff, and assess his damages as above indicated, even though they believe further, from the evidence, that the express-messenger was the prime mover and instigator of the action and language which put said minor in such fear as to cause him to leap from said train." And the following are the instructions asked by the defendant and refused, to which reference is made in

the opinion: "2. The court instructs the jury that the proof shows that the express-messenger was not the servant of the defendant, and the defendant is not liable for his acts. Therefore, if the boy, Charles Douglass, was impelled to jump from the car of the defendant by reason of the language or demonstration of the express-messenger, and not by the act or demonstration of an agent of defendant, the defendant is not liable, and they will find for the defendant." "4. The court instructs the jury that it appears from the evidence that the baggage-master of defendant had no authority beyond that of safely transferring the baggage, mail, etc., committed to his care; and if he was engaged, in company with the express-messenger, in threatening and terrifying the boy, Charles Douglass, for their own amusement, and not in the performance of any duty to the defendant, then he is liable for the reasonable consequences of his act, but the defendant is not liable, and they will find for the defendant."

Mayes and Harris, for the appellant.

James R. Chalmers and St. John Waddell, for the appellee.

CAMPBELL, C. J. The instructions given for the plaintiff are erroneous for want of the qualification that the baggage-master must have been about his master's business in the matter complained of, in order to make the master liable for what he did. If he was not about his master's business when he quit his own compartment of the car, and responded to the call of the express-messenger and went into another compartment, the master cannot be made responsible for his wrongful conduct. If he went forward about the business of his employer, and to perform any duty with respect to the boy, and while at that was guilty of wrongful conduct, the company is liable for it.

The second and fourth instructions asked by the defendant should have been given. The express-messenger was shown not to be the servant of the company, and it is not liable for his acts; and the servant who is not engaged about his master's business cannot impose liability on him.

Reversed, and remanded for a new trial.

MASTER AND SERVANT — TEST OF MASTER'S LIABILITY FOR ACTS OF SERVANT. — In order to hold a master liable for an act of his servant, it must be done within the scope of his general authority, in furtherance of the master's business, and for the accomplishment of the object for which the servant is

employed: *International etc. R'y Co. v. Anderson*, 82 Tex. 516; 27 Am. St. Rep. 902. and note. If a servant steps aside from his master's business, for however short a time, to commit a wrong unconnected with such business, the relation of master and servant is for the time being suspended, and therefore the master is not liable for the wrong: *Stephenson v. Southern Pac. Co.*, 93 Cal. 558; 27 Am. St. Rep. 223, and note; *Pittsburg etc. R'y Co. v. Shields*, 47 Ohio St. 387; 21 Am. St. Rep. 840, and note; extended note to *Kansas City etc. R. R. Co. v. Kelly*, 59 Am. Rep. 601; extended note to *Stone v. Hills*, 29 Am. Rep. 640; extended note to *Noblesville etc. Road Co. v. Gause*, 40 Am. Rep. 226; note to *Bryant v. Rich*, 8 Am. Rep. 316. As to the liability of the master for the willful, wanton, or malicious tort of a servant, see note to *Vanderbilt v. Richmond Turnpike Co.*, 51 Am. Dec. 318; also extended note to *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 192.

BILLINGSLEY v. POLLOCK.

[69 MISSISSIPPI, 752.]

INSOLVENT BANK, PERSON COLLECTING NOTE THROUGH, ENTITLED TO NO PRIORITY OVER OTHER CREDITORS. — Where a bank to which a note is sent for collection is paid by check on itself, drawn by one of its own depositors having ample funds on deposit, whose account it debits, and then remits by its check, but fails before it is paid, and passes into the hands of a receiver, the owner of the note has no lien on the assets of the bank, and is not entitled to priority over its other creditors.

THE appellant sent to the bank of Greenville, for collection, a note, the maker of which resided in or near Greenville. The note was paid by a check on the bank, drawn by a person named Evans, who had ample funds on deposit. The note was canceled and surrendered, Evans's check charged to his account, and the bank remitted for the collection its check on its New York correspondent. On the same day, however, the bank suspended, passed into the hands of a receiver, and the check was dishonored. The appellant filed her petition in the chancery court, praying that the collection made by the bank be decreed a trust, and a lien impressed on the general assets of the bank therefor, and that the receiver be directed to pay the same in preference to its general debts. The receiver's plea set out the facts, and alleged that the petitioner had no lien nor any right to demand payment in full of her debt. The court held this plea to be sufficient, and dismissed the petition.

Joshua Skinner and A. Lewenthal, Jr., for the appellant.

Yerger and Percy, for the appellee.

CAMPBELL, C. J. In *Ryan v. Paine*, 66 Miss. 678, we held that parties who sent a claim to a bank "for collection," which the bank collected by taking the check of the debtor on itself, the debtor having no money in the bank, but merely becoming the bank's debtor by this over-draft, after the insolvency of the bank was declared, had the right to treat their debtor as still such, and enforce their claim to what he owed the bank for account of this transaction.

In *Kinney v. Paine*, 68 Miss. 258, we held that parties who had sent their claim to an insolvent bank for collection, and which it collected by a check on itself by the debtor, who had no funds in bank, could follow and reclaim their own in the hands of the receiver. We are well pleased with these decisions, and reaffirm the obvious principle supporting them, but are unwilling to establish the proposition that a correspondent of a bank, whose claim it has collected and failed to pay over, has an equitable lien on all the assets of the bank, securing precedence over all other creditors of the bank. Some of the courts so hold, but we will not follow their lead to this absurd result. It is enough to allow the correspondent who sends his claim to a bank "for collection" to pursue and reclaim his own, without depriving others of their rights. There is no such magic in the word "trust" as to convert all the assets of a bank into a fund to secure one who deals with it for convenience of collecting claims, in preference to others who trust it and deal with it.

The maker of the note collected in this case was discharged, for she paid it. True, she did not have the money counted out to her on Evans's check, as we may assume would have been done if required, but that was not necessary. Evans had money there, and his check was received as money, and his deposit was lessened by that much. The transaction was a legitimate one in the usual course of business, and there is no just principle on which the appellant can be declared entitled to priority over other creditors of the insolvent bank. We should not be beguiled by the use of words, and call one claim a "trust," in order to secure it a preference over "debts." Wherever there is a trust, it may be enforced as such, but calling one sort of claim a trust merely to place it on a better footing is not allowable. It has been done in some instances, where hard cases have made bad precedents, which we will not follow.

Affirmed.

BANKS — INSOLVENCY — EFFECT OF, ON DEPOSITORS. — The money of a general depositor in a bank is the property of the bank, and subject to assignment by it for the benefit of creditors: *Hawes v. Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870. But in *National Butchers' et al. Bank v. Hubbell*, 117 N. Y. 384, 16 Am. St. Rep. 515, it was held that if a bank to which drafts or checks have been sent for collection makes a general assignment for the benefit of its creditors, its assignee does not acquire any title to such paper; and if they are collected, he is answerable to the owners for the amounts thereof. A bank hopelessly insolvent, to the knowledge of its president, received a deposit from a customer and immediately thereafter suspended and went into the hands of a receiver. It was held that the depositor might recover the amount of his deposit: *Oragie v. Hadley*, 99 N. Y. 131; 52 Am. Rep. 9, and note. The principal case follows *Kinney v. Paine*, 68 Miss. 258.

AMERICAN FREEHOLD LAND AND MORTGAGE COMPANY v. JEFFERSON.

[69 MISSISSIPPI, 770.]

USURIOUS CONTRACT, BY WHAT LAW GOVERNED. — The laws of this state and access to its courts cannot be made the subject of contract. If, therefore, a contract for the loan of money is usurious under the laws of another state, by which it is governed, the courts of this state will not respect a stipulation in the contract to the effect that if litigation shall arise, it shall be governed by the laws of this state, even though such loan is secured by a mortgage on land situated in this state.

VOID CONTRACT, EQUITABLE RELIEF AGAINST, DENIED, UNLESS COMPLAINANT SUBMITS TO DO EQUITY. — Although a contract is void under the laws of this state, so that no action can be maintained for its breach, a court of equity will not relieve against it, unless the complainant will submit to do equity, regardless of the terms or of the invalidity of the contract.

COMITY, PRINCIPLE OF, NOT EXTENDED TO ABROGATE SETTLED RULES BY WHICH COURTS ARE GUIDED. — The principle of comity under which a contract, void where made, will not be enforced in the courts of another state, even though by the laws of such state the contract, if it had been made there, would have been a lawful one, is never so extended as to abrogate the settled and controlling rules by which the courts of the state whose comity is invoked are guided.

RELIEF AGAINST USURIOUS CONTRACT — CONDITION UPON WHICH GRANTED IN EQUITY. — Courts of equity in this state, when applied to by a debtor who seeks relief against a usurious contract governed by the laws of another state, will require the complainant to do equity by refunding or tendering with his bill the principal of the debt, with legal interest.

BILL FOR RELIEF AGAINST USURIOUS CONTRACT DEMURRABLE WHEN. — A bill seeking relief against a usurious contract is demurrable if it fails to show an offer by the complainant to do that equity without which the court will deny relief.

BILL FOR ACCOUNTING, ALLEGATIONS NECESSARY IN. — A bill seeking relief against a usurious contract cannot be upheld as a bill for an accounting, unless it alleges that the complainant does not know, and cannot by the

exercise of proper diligence ascertain, the sums received and paid by him on such usurious contract.

ATTORNEY'S FEE, STIPULATION FOR, IN USURIOUS CONTRACT FALLS WITH CONTRACT. — A stipulation in a usurious contract for the payment of an attorney's fee in case of litigation falls with the contract of which it is a part, and cannot be enforced.

CONTRACTS for more than six per cent per annum are usurious both in New York and in Tennessee. And it is provided by statute in New York that the court of chancery shall decree such contracts void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled. Other facts are stated in the opinion.

Watson and Fitzhugh, for the appellants.

McDowell and McGowan, George Gantt, D. A. Scott, and Calhoun and Green, for the appellees.

COOPER, J. The appellees exhibited their bill in the chancery court of Coahoma County against the American Freehold Land and Mortgage Company and J. H. Watson, trustee, in a deed of trust executed by them to secure certain notes to said company. The purpose of the bill is to perpetually enjoin said defendants from causing sale to be made, in compliance with the powers contained in said deed, for the payment of the notes, and also to have such security canceled.

The bill charges that the appellees, in March, 1886, were residents of the city of Memphis, Tennessee, and the defendant company was a corporation incorporated by the state of New York, and having its domicile there; that on said date appellees executed their note to said company for the sum of \$25,000, payable at the office of the Corbin Banking Company in New York City on March 10, 1891; that interest on said note was to be paid at the rate of eight per cent per annum, for which complainants executed their six coupon notes, — one for \$1,444.46, payable December 1, 1886, four for \$2,000 each, payable, respectively, on the 1st of December, 1887, 1888, 1889, and 1890, and one for \$555.55, payable March 10, 1891, — all of said coupons being also payable at the office of the said Corbin bank, and all of them to bear interest at ten per cent per annum from maturity; that said principal note contains a stipulation that if default shall be made in its payment, an attorney's fee of ten per cent of the principal and interest shall become payable. The bill avers that the negotiation for the loan of the money was begun and concluded in the city

of Memphis and state of Tennessee, where complainants have resided for the past thirty years, neither of them having ever been a citizen of the state of Mississippi, and were conducted between Mr. Jefferson and the agent of the loan company resident in said city; that though the note is for \$25,000, only \$22,000 was paid to complainants, the residue of \$3,000 being in fact reserved by the defendant company as usury, but covered under the guise of commissions professed to be paid to the agent of defendants, who was recited in the negotiations to be the agent of complainants, and paid as such; that to secure the payment of said note and interest coupons, the complainants executed a deed of trust upon certain lands, situated in Coahoma County, Mississippi, by which deed power was given to the trustee to advertise and sell the lands upon default in payment of said note and coupons, and out of the proceeds of sale to pay said note and coupons; that upon advertisement by the trustee, there should become due and payable the sum of \$3,750 as attorney's fees, for which the deed of trust should also stand as security, and which was to be collected as a part of the secured debt. The bill also avers that although the notes were executed in Tennessee and were payable in New York, and although the complainants were residents of the state of Tennessee, as was well known to the defendant and its agents, the deed of trust was deceitfully and falsely made to recite that the same was made in the state of Mississippi, and to provide that the contract recited therein, and the notes secured thereby, should be construed according to the laws of the state of Mississippi.

The defendant demurred to the bill, upon the ground, among others, that the complainants sought relief without offering to do equity by paying the money received by them upon the faith of the security sought to be canceled. From a decree overruling the demurrer, an appeal has been granted to settle the principles of the cause.

We cannot assent to the proposition advanced by counsel for appellant, that the contract of these parties was a Mississippi contract, and is to be governed by our laws. The authorities cited by him can have no influence, under the circumstances of this case. The presumption of law is always in favor of the legality of purpose and motive of contracting parties; and where a contract is made in one state, to be executed in another, and under the laws of one would be illegal, and under those of the other legal, it is reasonable to presume

that the parties intended their contract to be controlled by the laws of the state in which it would be valid, and so the courts will, in furtherance of a presumed lawful intention, assign it to that state by which its validity will be upheld. So, too, there may be cases in which the law of the domicile of the debtor and situs of the security may be applied to a contract made in another state and to be performed in yet a third. We decline to enter this field of investigation, for the reason that the manifest and only purpose of the stipulation in the deed of trust that the contract should be governed by the laws of this state was, that the creditor might have the advantage of our usury laws, which are less stringent than are those of the state of Tennessee or New York. This is not a case for the application of the rule of favoring a lawful purpose by presumption, but it is one in which the parties, manifestly and purposely providing for usury, have sought to cloak the transaction, and evade the laws against usury by which their contract is controlled, by stipulating that if litigation shall arise, the laws of another state may be invoked as a shield to the usurer. The laws of this state and access to its courts cannot be thus made the subject of contract.

It is unnecessary to determine whether the contract involved is to be governed by the laws of Tennessee or by those of New York. It is conceded by the appellant that it is usurious under either, and that in neither could any action be brought and recovery had on the note or interest coupons.

This may be conceded to the complainants, and it may also be admitted that in an action by the creditors, either at law or in equity, nothing could be recovered in the courts of this state. All this may be conceded, and yet the question remains whether the complainants, with the money of the appellant in their hands, and without an offer to return it, can be afforded relief by a court of equity in this state under the principles which prevail here.

It is well settled here that though a contract be declared void by our own laws, by reason of which no action can be brought for its breach, a court of equity will decline to intervene, unless the complainant will submit to do what, *ex æquo et bono*, he ought to do, regardless of the terms or invalidity of the contract: *Deans v. Robertson*, 64 Miss. 195.

We recognize the principles of comity which prevail, and under which a contract void where made will not support an action in the courts of another state, even though by the laws

of such state the contract, if it had been there made, would have been a lawful one; but this principle has never been so extended as to abrogate the settled and controlling rules by which the courts of the state whose comity is invoked are guided. If the complainants and defendant were residents of this state, and had here made a contract prohibited by our laws, and the complainants had executed a security to be enforced *in pais*, and under the void contract had secured the money of the defendant, it is not to be doubted that our courts of equity would decline to entertain a bill for relief against the security at their instance, except upon condition of their doing equity.

It would be extending the rule of comity beyond all reasonable limits, if the courts of this state should afford relief against an agreement made in another state, and to a non-resident complainant, under a state of facts in which, if the controversy was between our own citizens and in relation to a transaction occurring here, relief would be denied. The complainants, appreciating the difficulty of securing a decree canceling the mortgage as security for both principal and interest, seek by their bill to obtain an accounting of the amount of money loaned to them by the defendants, and of the payments made by them as interest on the same, and ask that on such accounting all interest reserved be forfeited, and all payments of interest heretofore made be applied to the extinguishment of the principal, or if this be denied, then that all interest in excess of the legal rate be so forfeited and applied. They also seek relief against a stipulation in the notes and deed of trust, by which they agree that if default should be made in the payment of the notes, and a suit at law or in equity should be instituted for their enforcement, or if the trustee should advertise the mortgaged property for sale for the payment of the debt, an attorney's fee of \$3,750 should thereupon become due and payable, for the payment of which the mortgage should stand as security.

It is contended by complainants that, whatever may be the rule or conditions imposed by courts of equity in this state under which relief will be granted as against other agreements, it is the settled doctrine here that relief will be granted as against usurious contracts which are secured by mortgages or deeds of trust with power of sale, or by other instruments enforceable *in pais*, without an offer by the complainants to do equity; and that where an accounting is necessary to de-

termine the amount really and equitably due, no such offer or tender is required. It is also said that where relief is sought in equity against an executory usurious agreement, all interest unpaid will be forfeited, and that which has been paid will be applied to the extinguishment of the principal of the debt.

There is support for these propositions to be found in the argument of Judge Sharkey in *Parchman v. McKinney*, 12 Smedes & M. 631, and for some of them in the decision in that case, and in other subsequent decisions of this court. Some things said by Judge Sharkey, in argument in that case, have been denied to be correct, and a contrary rule established by subsequent decisions. It is important, therefore, to note what was decided in that case, and how much of what was therein said was only the argument of the judge in support of the conclusion reached by the court. To determine what was decision, it is important to know what the facts averred in the pleadings and disclosed by the evidence were. The conclusion of the court upon these facts constitutes its decision, but the process of reasoning by which that conclusion was reached is not necessarily decision, and in many instances is not. Parchman exhibited his bill against McKinney, averring that John Parchman, his intestate, had bought from McKinney, in the year 1835, a certain tract of land, at the price of \$6,500, of which he then paid in cash \$2,000, and for the remainder executed his two notes, each for the sum of \$2,250, one of which was to become due January, 1837, and the other, January, 1841; that both notes purported on their face to be for money loaned, and bore interest at ten per cent per annum; that to secure the note due January, 1841, his intestate had executed a deed to John H. McKinney, trustee, in trust, to sell the land thereby conveyed upon the failure of the maker to pay the note; that the defendant claimed there was due him the note due January, 1841, and interest thereon, and also held two other notes of complainant's intestate, one for about \$900 and one for about \$400; and that, to enforce the collection thereof, the defendant had procured the trustee to advertise the land for sale under the trust deed; that the notes for \$900 and \$400 were executed on account of the same transaction, and for interest, at a usurious rate, upon said note of \$2,250, due January, 1841; that during the lifetime of his intestate, he paid to the defendant, on account of said two notes of \$2,250 each,

the sum of \$5,300; that upon a just and legal computation of interest upon said debt, the balance due thereon, if anything, did not exceed \$1,125, which had been tendered to the defendant by way of compromise, but which he refused to accept or receive; that at the time of the purchase of the land and execution of these notes, it was corruptly and unlawfully agreed between the defendant and complainant's intestate that said intestate should pay McKinney interest at the rate of ten per cent per annum upon the amount of said notes from December 25, 1835, until their maturity, as for borrowed money, and that this agreement was made with the fraudulent intent of evading the statute against usury. The answer of the defendant admitted the usurious character of the contract, admitted that payments had been made by the intestate to an amount between three thousand and four thousand dollars, but said he was unable to state certainly how much was paid by him. He further stated that the notes originally given by the intestate matured in January, 1836 and 1837, and that after payments had been made, said intestate, in December, 1837, executed a new note for \$2,250, and made the deed of trust to secure it. The proof showed that the defendant compounded the interest on the debt from December, 1835, until April, 1844, the time of the last settlement with intestate; that when notes were taken for interest, as was the case at the end of each year, these interest notes were to bear interest at ten per cent, as for money loaned; that the principal and interest, as it accrued and became due, were compounded annually at ten per cent from the beginning to the end of the transaction, in April, 1844. Upon final hearing, the court directed an account to be stated, by which the defendant was allowed interest at the legal rate, and from a decree on such an accounting the administrator appealed.

The question for determination was, whether the defendant should have been allowed any interest. For the defendant it was insisted that since the complainant had invoked the interposition of a court of equity, he must submit to do equity, and that it was but equitable that the principal, with legal interest, should be paid.

The decision of the court was, that, under our then statute against usury, upon the facts above detailed, the defendant was not entitled to any interest upon his debt. Judge Sharkey began the investigation of the question by stating that the current of authority undoubtedly was that the defendant

should be paid interest at the legal rate, but inquired: "Can the rule be adopted in the present case?" He then proceeded to show that the rule, as applied generally, was under statutes by which both interest and principal were forfeited, and noted that by our statute the interest only was docked, leaving the right to the principal unimpaired, and no punishment was inflicted on the offender. He then argued to show that the debtor had had no opportunity of defending in a suit at law, and declared that he stood "upon the same ground that a defendant does who is making his defense at law when sued on a usurious contract," and then continued: "But, above all, the statute made to prevent usurious contracts is protected, its end and object accomplished; it is not made the instrument of fraud. The general rule is, that equity must follow the law, and they cannot depart from it without some obvious reason. For these reasons, it would seem that the general rule requiring the party to pay the principal and legal interest cannot apply in this case; and this accords with the opinion of the chancellor in *Marks v. Morris*, 4 Hen. & M. 468, which was a very similar case. The bill was brought for relief against deeds of trust, which the trustee was about to carry into effect, on the ground of usury, and, against the same objections here raised, the party was held entitled to interest. Perhaps this question might have been made to rest entirely on a fair construction of the statute: Howard and Hutchinson's Rev. Stats. 374. After providing the rate of ten per cent interest for a loan of money, and so expressed on the face of the instrument, the statute proceeds: 'Provided, that if any contract, bond, or note founded on any other consideration than the *bona fide* loan of money shall fraudulently and deceitfully express therein that the same is entered into or given for money lent, and specify a greater rate of interest than is allowed by this act, if such fraud or deception shall be discovered in any suit at law or in equity, no interest or premium shall be allowed or recovered on such fraudulent contract, bond, or note, but the principal sum only shall be recovered.' This provision seems to be sufficiently broad to extend to actions brought by either party, and it expressly extends to courts of equity, and thus furnishes a law for those courts. And we have precisely the description of case described by the statute, — one that fraudulently and deceitfully expresses on its face that it was given for money lent."

The able judge evidently labored in his argument, which,

though vigorous and clearly expressed, as were all his utterances, is not marked by that adherence to well-settled principles for which his opinions have been justly esteemed. His reference to the maxim that equity follows the law was exceedingly unfortunate, in view of the fact that but a few lines above he had conceded that the current of authority undoubtedly was that equity would not relieve, as against a usurious contract, except upon terms, and that "the rule originated under the provisions of the statute of 12 Anne, which made all usurious contracts void, and imposed heavy penalties upon the usurer." In other words, that the rule was announced by courts of equity in mitigation of and opposition to the rule of law. Nor could the learned judge have been oblivious of the fact that a favorite device of the usurers in England for evading the consequences of usury had been to take warrants of attorney for confessions of judgment, under which the debt could be reduced to judgment without notice to the defendant. Indeed, so common had become that practice that the courts of common law began to exercise an equitable jurisdiction by awarding a feigned issue upon motion suggesting that the judgment was upon a usurious contract, and, upon the fact of usury being found, vacating the judgment.

In *Fanning v. Dunham*, 5 Johns. Ch. 122, 9 Am. Dec. 283, Chancellor Kent reviewed many of the English cases where relief had been granted by the courts of common law in England.

In *Fanning v. Dunham*, 5 Johns. Ch. 122, 9 Am. Dec. 283, the complainant sought relief in equity against a judgment entered upon a power of attorney, and also against the execution of a power of sale *in pais* conferred by a mortgage given to secure the debt, which was alleged to be usurious. There, as in *Parchman v. McKinney*, 12 Smedes & M. 631, the complainant sought by his bill to have all the securities taken by the defendant, and infected with usury, declared void and ordered to be canceled, without offering to pay anything. But Chancellor Kent, after a full review of the cases, declared that "the equity cases speak one uniform language; and I do not know of a case in which relief has ever been afforded to a plaintiff seeking relief against usury by bill upon any other terms. It is the fundamental doctrine of the court. Lord Hardwicke said (1 Ves. 320) that in cases of usury equity suffers the party to the illicit contract to have relief, but who-

ever brings a bill in cases of usury must submit to pay principal and interest."

Judge Sharkey was unwilling to rest his opinion upon the proposition that a court of equity follows the law, and that a contract void at law will, for that reason, be relieved against in equity without terms, or upon the feature of an absence of an opportunity to defend at law; for, finally, he declared that the statute itself, by reason of its peculiar terms, should control courts of equity as well as of law, and also that, in furtherance of the policy of this state, finding expression in the statute, the same rule should apply, whether the debtor was defending in a suit at law or in equity, or was a complainant in equity seeking relief.

This court, in *Deans v. Robertson*, 64 Miss. 195, declined to accept the suggestion made in the argument of *Parchman v. McKinney*, 12 Smedes & M. 631, that the absence of an opportunity to defend against the demand at law because the debtor had given a mortgage with power of sale was sufficient ground to warrant a court of equity to relieve against a contract void at law without requiring the complainant to submit to do equity.

The case of *Parchman v. McKinney*, 12 Smedes & M. 631, has been adhered to, on the principle of *stare decisis*, to the extent in which it was decision. But the argument of Judge Sharkey has never been assented to as correct, beyond the rule that, in support of the public policy of this state, contracts which are obnoxious to our statute against usury, made here or governed by our law, will be relieved against in equity, and that, whether the debtor be defendant against whom relief is sought, or complainant seeking relief, payment of the principal debt, without any interest, was all that should be required. It was not held in *Parchman v. McKinney*, 12 Smedes & M. 631, nor has it been in any case following it, that the complainant would not be required to do equity as a condition upon which relief would be granted. The question was, What should equity require him to do? And in construing our statute, the court concluded that it would be equitable for him to pay only the principal of the debt. *Norcum v. Lum*, 33 Miss. 299, *Hooker v. Austin*, 41 Miss. 717, and *Long v. McGregor*, 65 Miss. 70, were cases in which decrees had been rendered on final hearing, as was *Parchman v. McKinney*, 12 Smedes & M. 631, and followed the decision of *Parchman v. McKinney*, 12 Smedes & M. 631,

in so far as to declare that the complainant should only be required to pay what might have been recovered at law.

In *Dickerson v. Thomas*, 68 Miss. 156, it was held that a complainant, seeking to recover back usurious interest paid by him (the usurious contract having been fully executed), could recover only the excess above the legal rate. Certainly, under all our decisions, if the contract between the complainants and the defendant had been entered into in this state, and had been usurious under our laws, the complainants would be required to return the money they actually received from the defendant as a condition to securing relief in equity in a bill filed by them.

We cannot perceive any public policy of this state which is to be conserved by applying the rule prescribed by our statute, of forfeiting all interest, to a contract made in another state. This is not a suit upon the contract, and its terms and conditions furnish no standards by which the court is to be guided. The conscience of the court, its appreciation of what is just and equitable, not only here, but in New York and Tennessee, and everywhere, is the sole and sufficient test as to the terms upon which it will afford relief. The complainants got the money of the defendant, by their own showing. They now repudiate the contract by which it was secured, and seek the aid of the court to annul a security given, not alone for the usurious interest, but for the principal as well. Relief will be afforded, but only upon condition that complainants shall do equity; and by an unbroken current of authorities it is settled that equity, in a case like this, is to refund the money, with legal interest.

In none of the cases above noted, arising under our usury statutes, was the point made by demurrer that the complainants had not offered to do equity. As we have said, the questions were raised on appeal from final decrees on the merits. But in *Deans v. Robertson*, 64 Miss. 195, it is decided that a bill for relief is demurrable if it fails to show an offer by the complainant to do that equity without which the court will deny relief. The complainants should have tendered to the defendant the principal sum received by them, with legal interest thereon, and the tender being refused, should have brought the money into court, or offered so to do by their bill. It may be that the defendant will accept the offer when made. If it does, no resort to the courts may be necessary.

The case made by the complainants is not sufficient to up-

hold their bill as one for an account. They know, or may know by proper diligence (so far as the bill shows to the contrary), what sum they received; they know what sum they have paid; and it is therefore but a matter of calculation to determine exactly what amount they should offer to pay.

It is proper to add that the stipulation in the notes and the deed of trust relative to the payment of an attorney's fee falls with the contract, of which it is a part. As we have said, the contract furnishes no guide to the court in determining what sum shall be paid by complainants. It is enough that they return to the defendant its money, with legal interest thereon.

Under the circumstances of the case, we think it improper to make a final disposition of the case here. The appeal was manifestly brought to settle its principles, and it may be that the complainants may desire to amend their bill, and tender to the defendant the money due. In order that an opportunity to do so may be afforded them, the decree will be reversed, and remanded to the court below, with directions to sustain the demurrer.

USURIOUS CONTRACTS — BY WHAT LAW GOVERNED. — A contract void by reason of the laws of the state where it was made and is to be performed is void elsewhere: *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461, and note. A contract not usurious in the state where it is made, and where the payee resides, cannot be attacked for usury in the state where it is made payable: *Staples v. Nott*, 128 N. Y. 403; 26 Am. St. Rep. 490, and note, with cases collected, discussing by what law interest is governed. A promissory note is controlled as to the defense of usury by the laws of the state where made, dated, and payable, and not by the laws of the state where negotiated: *Jewell v. Wright*, 30 N. Y. 259; 86 Am. Dec. 372, and note; *Olague v. Creditors*, 2 La. 114; 20 Am. Dec. 300, and note. Parties to a contract having agreed upon a rate of interest valid in the state where the borrower resided, in the absence of anything to the contrary, they must be presumed to have contracted with reference to the laws of that state: *Mott v. Rowland*, 85 Mich. 561. For an extended discussion of the subject, see note to *Morris v. Hockaday*, 55 Am. Rep. 609.

EQUITY. — HE WHO SEEKS EQUITY MUST DO EQUITY; therefore one who seeks to set aside a judgment improperly recovered against him must pay into court the sum which, by his own statements, he has shown himself to owe the plaintiff: *Gregory v. Ford*, 14 Cal. 138; 73 Am. Dec. 639. Where a person in peaceable possession of realty under claim of lawful title, but with really defective title, has in good faith made permanent improvements, the true owner, who seeks in equity to establish his title, must reimburse the occupant for his expenditures: *Thomas v. Evans*, 105 N. Y. 601; 59 Am. Rep. 519; *Pratt v. Thornton*, 28 Me. 355; 48 Am. Dec. 492; *Dilworth v. Sinderling*, 1 Binn. 488; 2 Am. Dec. 469. A party praying for the cancellation of a conveyance must tender the money received thereon: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806, and note. A court of equity will not relieve a

mortgagor who, through negligence, fails to perform his contract, whereby the whole debt becomes due and payable according to the terms of the mortgage, unless he tenders or pays the whole debt: *Noyes v. Clark*, 7 Paige, 179; 32 Am. Dec. 621. Taxes paid by the purchaser upon a void sale, with interest and expenses, must be refunded by the heir, who comes into equity to disencumber his title: *Nowler v. Coit*, 1 Ohio, 519; 13 Am. Dec. 640, and note. Where a plaintiff wants a deed corrected in his own favor, equity will refuse him aid, unless he is willing that other mistakes therein should be corrected, which would be against his interests. He who seeks equity must do equity: *Morisey v. Swinson*, 104 N. C. 555.

EQUITY — RELIEF FROM USURIOUS CONTRACTS. — He who goes into a court of equity seeking relief from a usurious contract must pay legal interest on the debt: *Cook v. Patterson*, 103 N. C. 127. The contrary is held in *Low v. Loomis*, 53 Ark. 454, which was a case where a deed absolute was given to secure the payment of a usurious loan, and a decree was made canceling the deed and restoring the land to the borrower, without requiring the payment of any part of the usurious debt or interest as a condition to relief. See also *Long v. McGregor*, 65 Miss. 70.

COURTS — COMITY. — Evasions of usury laws are not countenanced; and when courts detect them, they will withhold any aid to those who make foreign contracts a pretense for exacting usury at home: *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651, and note.

ATTORNEY'S FEES — VOID CONTRACT. — A counsel does not forfeit his right to compensation for services by entering into a champertous contract: *Ruel v. Larue*, 4 Litt. 412; 14 Am. Dec. 172.

LOUISVILLE, NEW ORLEANS, AND TEXAS RAILWAY COMPANY v. BLYTHE.

[60 MISSISSIPPI, 230.]

CONSOLIDATION OF RAILWAY COMPANIES, RIGHTS ACQUIRED BY. — When the legislature authorizes the consolidation of two or more railway companies, the consolidated company succeeds to the property of each of the companies held by it before the consolidation.

EMINENT DOMAIN — CONDEMNATION OF LAND OF MINOR NOT NECESSARY WHEN GUARDIAN AND COMPANY AGREE. — A statute providing that the guardian of any infant, *non compos*, or insane person may agree with a railroad company upon the damages to be paid for land of his ward taken by it, or release his ward's claim for damages, dispenses with the necessity for the condemnation of the land in cases where the guardian and the company can agree.

CONSTITUTIONAL LAW — POWER OF LEGISLATURE TO AUTHORIZE GUARDIAN TO CONVEY WARD'S LANDS. — The legislature has power to confer upon guardians the authority to convey to a railroad company the right of way over the lands of their wards. The power resides in it, as *parens patrie*, to prescribe such rules and regulations as may be proper for the management, superintendence, and disposition of the property of persons under disability.

ENACTMENT OF LAW AUTHORIZING GUARDIAN TO CONVEY WARD'S LAND NOT EXERCISE OF JUDICIAL POWER. — The enactment of laws authorizing guardians to convey the lands of their wards is not the exercise of judicial power by the legislature. Nor are such laws unconstitutional because they do not provide for notice to the ward whose land is conveyed.

CONSIDERATION, ERECTION, AND MAINTENANCE OF RAILWAY STATION ON LAND IS VALUABLE. — The erection and maintenance of a railway station on land of a ward conveyed by his guardian to the company is a valuable consideration for such conveyance.

Mayes and Harris, for the appellant.

Morgan and Buchanan, for the appellees.

JOHNSTON, Special Judge. On the fifteenth day of May, 1884, Mrs. Blythe, as the guardian of her two minor children, conveyed by deed the right of way through the lands of her wards to the New Orleans, Baton Rouge, Vicksburg, and Memphis Railroad Company, the consideration expressed in the deed being for the sum of one dollar and the further condition that the grantee, the railroad company, should establish and maintain a depot and section-house and tank on the land.

The minors owned the land in common with Mrs. Blythe, their mother, and three other adult tenants in common, all of whom joined in the conveyance to the railroad company.

The second section of the charter of the New Orleans, Baton Rouge, Vicksburg, and Memphis Railroad Company (Laws 1882, p. 920), after providing that the company could own a right of way acquired by purchase, grant, or devise, and also the mode and manner by which the right of way could be taken by condemnation proceedings, concludes with the following provision: "When any land, to be taken for the purposes aforesaid, shall belong to any infant, *non compos*, or insane person having a resident general guardian, such guardian may agree with said company upon the amount of damages to be paid for taking such lands, or release to said company his claim or right to damages in the premises." This charter was granted on March 9, 1882.

In 1870 the Memphis and Vicksburg Railroad Company was incorporated. By an act of March 3, 1882, the Memphis and Vicksburg Railroad Company was authorized to consolidate with the Mississippi Valley and Ship Island Railroad Company, and these to consolidate with any other companies, the consolidated company to enjoy all the rights and franchises conceded to the different companies entering into the

consolidation. This act was amended by the act of March 15, 1884, so as to permit the Memphis and Vicksburg Railroad Company to consolidate with any other companies, whether the Mississippi Valley and Ship Island Railroad Company became a party to the consolidation or not.

In August, 1884, under the authority of these statutes, the Memphis and Vicksburg Railroad Company, the New Orleans, Baton Rouge, Vicksburg, and Memphis Railroad Company, the New Orleans and Mississippi Railroad Company, and the Tennessee Southern Railroad Company were consolidated under the name of the Louisville, New Orleans, and Texas Railway Company, this appellant.

The grantee in the deed of May 15, 1884, took possession of the land conveyed as the right of way, fenced the line, constructed its road, and established the depot, section-house, and tank, which have, since the consolidation, been maintained by the appellant. In a word, up to the present time the conditions of the deed have been performed.

Some time after the execution of the deed, Mrs. Blythe died, and the appellee, J. A. Jordan, was appointed guardian of the two minors, who brought the present ejectment suit against the appellant for the recovery of the two-fifths undivided interests of his wards in the land conveyed by their former guardian.

The plaintiffs, as well as the defendant, in the suit claim through G. L. Blythe, deceased, the father of these minors, as the common source of title, and the question of title involved in the controversy depends alone upon the validity of the deed made for the minors by their former guardian on May 15, 1884.

The circuit court refused to grant a peremptory instruction directing the jury to find a verdict for the defendant, and, upon a verdict in favor of the plaintiff, the court rendered a judgment for the property and \$250 damages by way of mesne profits, and thereupon this appeal was taken by the railroad company.

It is contended by counsel for the appellees that the appellant did not acquire the privilege or right conferred by the second section of the act of March 9, 1882, upon the New Orleans, Baton Rouge, Vicksburg, and Memphis Railroad Company, for the reason that the statute authorizing the consolidation of the Memphis and Vicksburg Railroad Company with other companies was passed on March 8, 1882, six days

prior to the incorporation of the New Orleans, Baton Rouge, Vicksburg, and Memphis Railroad Company, and that the consolidating act, in so far as it gave the consolidated company the charter rights and franchises of the different consolidating companies, applied only to then existing companies.

The question whether the special franchise or privilege granted by the act of March 9, 1882, has been acquired by the appellant by its consolidation with the railroad company incorporated by this statute, and has thus become a part of its own charter, is not presented in this case, and is not necessary or proper to be decided, and upon which no opinion is expressed. The appellant does not so claim the property in controversy, but upon an entirely different theory. The New Orleans, Baton Rouge, Vicksburg, and Memphis Railroad Company, during its corporate existence, acquired this right of way under the deed made by Mrs. Blythe, the former guardian, and in which it was the grantee, and the appellant claims this title derivatively, and by reason of its consolidation with that company, and as part of its property and assets. There can be no doubt that the consolidation, under the act of March 3, 1882, and the amendatory act of March 15, 1884, vested in the new company the property and assets of all the consolidating companies, of which the New Orleans, Baton Rouge, Vicksburg, and Memphis Railroad Company was one, and whatever title vested in the grantee by the deed passed to this appellant.

It is argued in behalf of the appellees that the guardian could convey under the authority of the last clause of the second section of the act of March 9, 1882, only after there had been a condemnation of the property, and an ascertainment of its value as provided in the preceding clauses of the section. This view is not a correct construction of the statute, which authorized the guardian to agree with the company upon the amount of damages, or release all claim to damages. Evidently this was intended as a distinct mode by which the company could acquire the right of way, and its purpose and effect was to dispense with the necessity for condemnation proceedings in this class of cases. The discretionary power was confided to the guardian of adjusting the damages with the railroad company, as was also the authority to decide whether it would be beneficial to the ward's estate to convey the right of way without any pecuniary or direct compensa-

tion or consideration. This, precisely as in case of a person *sui juris*, obviated the necessity for any condemnation proceedings.

The more important question presented in this case is, whether it was beyond the limits of legislative power for the legislature to confer upon guardians the authority to convey the right of way in the lands of their wards, as provided in the second section of the act of March 9, 1882.

The objections urged against the validity of this statute are: that it is a legislative usurpation of judicial power, full jurisdiction in minors' business having been confided by the constitution to the courts of chancery; that it provides no notice to the minor who is the owner of the land, and therefore the method provided by this statute for taking private property for public use is not "due process of law"; and finally, that it dedicates private property to public use without due compensation first being made to the owner.

These objections will be examined in the order stated.

The doctrine is firmly established by the great weight of American decisions, and sustained by the most cogent and unanswerable reasoning, that special acts of the legislature authorizing or confirming the sale of lands by guardians are constitutional when their object is simply to provide a change of investment, and not to divest the beneficiary of property rights, in the absence of special or exceptional constitutional limitations, and that such acts are not judicial, but the proper exercise of legislative power.

Such a power necessarily resides in the legislative department of the government, as *parens patriæ*, to prescribe such rules and regulations as may be proper for the management, superintendence, and disposition of the property of infants, lunatics, and persons who are incapable of managing their own affairs.

This principle was announced by Judge Story, who delivered the opinion of the supreme court of the United States in *Wilkinson v. Leland*, 2 Pet. 660, — a decision that was followed in the case of *Watkins v. Holman's Lessee*, 16 Pet. 25, and also in *Hoyt v. Sprague*, 103 U. S. 613. In *Hoyt v. Sprague*, 103 U. S. 618, Mr. Justice Bradley, delivering the opinion of the court, speaking of this class of statutes, said: "The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the

courts, the power exercised is of a legislative character, the legislature making a law for the particular case."

Such has been the uniform course of decisions in this state. *Williamson v. Williamson*, 3 Smedes & M. 715, 41 Am. Dec. 636, was followed and affirmed in *McComb v. Gilkey*, 29 Miss. 146, and again in *Boon v. Bowers*, 30 Miss. 246; 64 Am. Dec. 159.

The three cases cited by counsel for the appellees do not controvert the correctness of the principle as we have stated it.

The statute involved in the Illinois case of *Lane v. Dorman*, 3 Scam. 238, 36 Am. Dec. 543, expressly adjudicated a debt in favor of a particular creditor, and directed a sale of the minor's lands for its payment. The court characterized the statute, for this reason, as in the nature of a judicial decree.

In the Pennsylvania case of *Shoenberger v. School Directors*, 32 Pa. St. 34, the statute before the court directed the sale, by two strangers, of land that had been devised to the testator's widow for life, with power of appointment by last will and testament to such persons as she might appoint, with remainder over to various specified persons, some of whom were minors. The court said the statute "was simply an authority to strangers to seize and sell an estate under no obligation or necessity to be sold. It was a legislative repeal of a private citizen's will."

Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430, a Tennessee decision, proceeded on the construction of a special statute, which the court interpreted to adjudicate and determine the question of the debts for which the land was directed to be sold, and accordingly held the statute unconstitutional, on the ground that it was, in this respect, the exercise of judicial power. It will be seen that *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430, stands apart from the general constitutional doctrine, and rests alone upon the construction of the particular statute then being considered.

An opinion given by the judges of the supreme court of New Hampshire to the legislature of that state, reported in the fourth volume of New Hampshire reports, stands alone and unsupported in its broad and unconditional denial of power in the legislature in this class of cases.

The constitution of Mississippi, it is true, invests the chancery courts with full jurisdiction in minors' business, but having ascertained that the special power exercised in this

class of statutes is legislative, and not judicial, it is evident that the legislature has not usurped in any respect the powers or functions of the judicial department of the government.

So the former constitution of 1832 gave the probate courts jurisdiction in all matters testamentary and of administration and in orphans' business, but by a long line of decisions it was held that the power of those courts over the lands of decedents and infants was derived from legislative grant, and was therefore purely statutory, and not constitutional.

The power of determining controversies, of adjudicating debts, and deciding questions of property and personal rights is purely judicial, but the delegation of the power of selling lands for the payment of debts that are to be ascertained and adjudicated by the courts is not in any sense a judicial act, but the exercise of legislative power.

The statute now under consideration contains two distinct features. It confers upon the guardian the authority to agree upon the compensation for the ward's land to be taken as the right of way, and also the authority to release all claim to damages and compensation.

In this case the deed was made upon an independent and valuable consideration, contained in the condition subsequent in the deed and running with the grant, that the railroad company should erect and maintain a depot and station on the land,— a condition which has been performed. The deed is not voluntary and without consideration, but, on the contrary, its consideration may be of greater value than a money compensation for the strip of land taken as a right of way. The adult co-tenants evidently regarded it as of equal value to the land conveyed to the railroad company, and it can readily be perceived that such a consideration may not only be ample compensation for the right of way granted, but in many instances might far exceed the money value of the land granted to the railroad company as a roadway.

A conveyance on such a consideration is in no just or proper sense the dedication of private property to public use without compensation. The railroad company has stipulated to maintain this depot on the land conveyed by these owners, partly for their profit and convenience in receiving their supplies and shipping their crops,— a full equivalent for the right of way. This condition is not only a valuable but a continuing

one, and upon its failure the land granted will revert to the grantors, at their option, according to their original title.

If the legislature has the power to authorize a guardian to sell the lands of his ward for the payment of debts or the reinvestment of the proceeds, the power must exist to authorize a guardian to sell a part of his ward's plantation as a right of way, for the consideration of the erection and maintenance of a railroad station on the land, which, in actual value, is a fair compensation for the land conveyed, and which will be to the benefit and not to the injury of the infant owner.

There is no deprivation of property in such a case, but the conversion of its value from one form into another. Such an arrangement amounts to direct compensation, not in money, but its equivalent, and the power wisely exercised, as it seems to have been in this case, would be to the interest of the minor.

We are unable to perceive any sound principle of constitutional law upon which the power delegated to this guardian, and exercised by him in executing this deed, has been violated or disregarded.

The objection that no notice to the minor is provided by the statute cannot be sustained. It is settled in this state that notice to minors is not necessary in proceedings in the chancery court for the sale of lands derived from their ancestor: *Burrus v. Burrus*, 56 Miss. 92; *Baily v. Fitzgerald*, 56 Miss. 578; *Johnson v. Cooper*, 56 Miss. 608. And the same rule was announced by the supreme court of the United States in *Florentine v. Barton*, 2 Wall. 210.

The question is simply one of the power of the legislature to authorize the guardian to convey the land, and in none of the numerous cases of the class to which this belongs has notice to the minor been regarded as essential in any respect.

We are of the opinion that the deed executed by the guardian in this case is legal and valid, and the statute, in so far as it authorizes a conveyance of the minor's land for a distinct and direct consideration which is a fair and just compensation, whether for money or its equivalent, is within the limits of legislative power.

Whether the provision of the statute permitting a guardian to release the damages, and convey the right of way for no independent consideration, but solely in expectation of indirect and remote benefits flowing or resulting from the construction of the road as an improvement, is a question not involved in

the case now under consideration, and upon that it is unnecessary to intimate an opinion.

From these views, it follows that the judgment of the circuit court must be reversed, and the cause remanded.

CORPORATIONS — CONSOLIDATION — EFFECT OF. — The consolidation of two corporations into one new one ends their separate existence, and vests all their effects and franchises in the new company: *Indianapolis etc. R. R. Co. v. Jones*, 29 Ind. 465; 95 Am. Dec. 654; *McMahan v. Morrison*, 16 Ind. 172; 79 Am. Dec. 418, and extended note 425, where the effect of consolidation upon the property of the previously existing corporations is discussed. The consolidation of corporations amounts to a surrender of the old charters and the formation of a new corporation out of such parts of the old as enter into the new: *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405. The legal effect of the consolidations of two or more corporations is a perfect amalgamation which terminates the existence of the consolidating companies, and operates the creation of a new one, concentrating in one corporation the members, the property, and the capital stock of all: *Board of Administrators v. New Orleans Gas etc. Co.*, 40 La. Ann. 382; *People v. New York etc. R'y Co.*, 129 N. Y. 474.

RAILROADS — LOCATION AND MAINTENANCE OF STATIONS. — A railroad cannot be compelled to locate stations on its road at points where the cost of maintaining them will exceed the profits resulting therefrom, nor allowed to locate them so far apart as to practically deny to communities on its road reasonable access to its use: *Mobile etc. R. R. Co. v. People*, 132 Ill. 559; 22 Am. St. Rep. 556, and note; *People v. Chicago etc. R'y Co.*, 130 Ill. 175. As to whether agreements to locate a station at particular point on the line of a railroad is a good consideration for a deed, see extended note to *Williamson v. Chicago etc. R. R. Co.*, 36 Am. Rep. 214, 215. As to whether such an agreement is a good consideration for a railway bonus note, see *Williams v. Fort Worth etc. R'y Co.*, 82 Tex. 553.

GUARDIAN AND WARD — POWER OF LEGISLATURE TO AUTHORIZE GUARDIAN TO SELL WARD'S REALTY. — An act of the legislature authorizing guardians to sell the lands of their wards, and to apply the proceeds to their maintenance under order of the court, is not unconstitutional as encroaching upon the judicial department of the government: *Stewart v. Griffith*, 33 Mo. 13; 82 Am. Dec. 148, and note. The power to exercise guardianship over the estates and persons of infants does not exist in the legislature; and a special act authorizing guardians to sell lands of infant wards to pay the debts of the latter's ancestor is judicial in its character, and unconstitutional: *Jones v. Perry*, 10 Yerg. 59; 30 Am. Dec. 430. and note.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

CROUCH v. GUTMANN.

[134 NEW YORK, 45.]

SUBSTANTIAL PERFORMANCE OF BUILDING CONTRACT, RECOVERY UPON, MAY BE HAD WHEN. — When a builder has in good faith intended to comply with a building contract, and has substantially done so to such an extent that the defects are not pervasive, do not constitute a deviation from the general plan of the work, and are not so essential that they may not be remedied without difficulty, slight defects, caused by inadvertence or unintentional omissions, will not necessarily prevent a recovery of the contract price, less the amount, by way of damages, requisite to indemnify the owner for the expense of conforming the work to that for which he contracted. And whether or not there has been a substantial performance of the contract is usually a question of fact.

FORFEITURE FOR DEFICIENCY IN WORK DONE UNDER BUILDING CONTRACT CANNOT BE ASSERTED BY OWNER WHEN. — When it is provided in a building contract that if the contractor shall at any time during the progress of the work refuse or neglect to supply a sufficiency of materials or workmen, the owner may, after notice, finish the work and deduct the expense incurred thereby from the amount of the contract price, and the owner avails himself of this privilege, he cannot assert a forfeiture in respect to the deficiency so supplied by him, but is simply entitled to deduct the expense incurred.

ARCHITECT'S CERTIFICATE, REFUSAL TO GIVE, UNREASONABLE WHEN. — When, by the terms of a building contract, the architect's certificate is a condition precedent to a right to payment, and, after the work has been substantially completed, the architect refuses to give a certificate, his refusal is unreasonable, and the failure to obtain it will not bar a recovery by the contractor.

ACTION to recover money alleged to be due from the defendant for work done on his building by John Wadsworth and Son, and to which plaintiffs had, by transfer, become entitled. John R. Stauchen entered into a contract with the owner to furnish material and erect the building. At the time this

contract was made, Stauchen sublet the carpentry work of the building to the Wadsworths, with defendant's knowledge and assent. The acceptance of the order given by the Wadsworths to the plaintiffs upon the defendant, to which reference is made in the opinion, is in the following words:—

“This order is accepted, payable out of the balance which may be due Messrs. Wadsworth and Son when the building is completed, to the extent of such unpaid balance, and no more, and on the architect's certificate only.

“MAX L. GUTMANN.”

The referee directed a judgment against the defendant for \$633.57, with interest from October 1, 1887. Other facts appear from the opinion.

S. D. Bentley, for the appellant.

Charles M. Williams, for the respondents.

BRADLEY, J. The acceptance of the order given by the Wadsworths to the plaintiffs upon the defendant was in terms conditional, and payment made dependent upon completion of the building and on the architect's certificate. And by the contract such certificate was made a condition precedent to the right to any payments upon the work. No such certificate was obtained by the Wadsworths or the plaintiffs in support of the demand for payment of the amount of the order, or any portion of it, but upon application made to him November 29, 1887, by one of the plaintiffs for a final certificate on the work, the architect put his refusal in writing of that date as follows:—

“MR. F. P. CROUCH,—Replying to your request for final certificate on the Gutmann contract, I regret that there are so many things which are imperfect that I am prevented from certifying to the satisfactory completion of the work under the contract.

JAMES G. CUTLER, Architect.”

The parties to the contract by it made the architect's certificate essential evidence of performance and of the right to payment founded upon it, and unless its production was in some manner waived, or its necessity otherwise overcome or obviated, the failure to obtain it constituted a bar to recovery by the plaintiffs: *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442. In support of his conclusions, the referee found that the contractor, Stauchen, substantially performed the work on his part, and that on his adjustment with the defendant there

was deducted \$199.55 for defective mason-work, and \$1,300 for delay from April 1 to August 8, 1887, in completing the work; and that the Wadsworths substantially performed the agreement on their part, though in some particulars their work was not first-class, but there was no willful or intentional departure on their part from the terms of the contract; and that such defects did not pervade the whole work, and were "not so essential that the object which the parties intended to accomplish was not accomplished." He also found that the architect refused to give the plaintiffs a certificate for final estimate, and upon demand refused to give any certificate, and that his refusal to give any certificate was unjust and unreasonable. The latter may have been supported if the finding of substantial performance was warranted. Both propositions are challenged by the defendant's exceptions. Since the rule of exact or literal performance has been relaxed, and recovery may be founded upon substantial performance, that term, in its practical application to building contracts, has perhaps necessarily become somewhat indefinite, otherwise than that the builder must have in good faith intended to comply with the contract, and shall substantially have done so, in the sense that the defects are not pervasive, do not constitute a deviation from the general plan contemplated for the work, and are not so essential that the object of the parties in making the contract, and its purpose, cannot, without difficulty, be accomplished by remedying them. Then slight defects caused by inadvertence or unintentional omissions are not necessarily in the way of recovery of the contract price, less the amount, by way of damages, requisite to indemnify the owner for the expense of conforming the work to that for which he contracted. And whether, having in view those guiding considerations, the contractor has proceeded in good faith, and the defects are slight in the sense applicable to them in their relation to the work as a whole, are usually questions of fact, and upon their determination is dependent the disposition of that of substantial performance: *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449; *Phillip v. Gallant*, 62 N. Y. 256; *Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 88 N. Y. 648.

In the present case the defective condition of the carpenter-work from all causes, as described by the findings of the referee, were that the walls of the building settled to some extent, thereby affecting the carpenter-work; that the base-

boards in many cases parted from the floor; that such shrinkage of the boards was without the fault of the Wadsworths or the material furnished, but was due to the settling of the walls and partially to the steam heat; that the materials furnished by them were according to the terms of the contract, except that of the shelving in closets and the maple flooring for the halls, part of which was second-class material. These facts have some evidence for their support.

The referee further found upon the subject of defects in the carpenter-work, that when the Wadsworths stopped work in the latter part of July, 1887, there were defects in their work in the following respects: "In the bath-rooms, in the hardwood floors, pieced casings on windows in rear of building, defective hand-rail on front stairs, molding in some portions of the building not properly smoothed before oiling, imperfect painting on the front of the building"; and further, that on the defendant's three days' notice provided by the contract, and given on July 30, 1887, to the contractor to provide materials and workmen to complete the work, the defendant employed to remedy the defects one Pike, a carpenter, whose work upon the building was "fixing the doors so they would latch, and windows so they would slide, fixing covers on wash-trays, fixing back stairs, being defects principally due in part to poor workmanship, and in part to settling of the building; that the front of the building was repainted by men employed by Pike, the original job having been a poor one, showing spots, and in some cases, when Pike's repairing made it necessary, additional coats of oil were put on the building in the interior"; and that the fair value of the labor and materials necessary to remedy and make good the defective and omitted work covered by the specifications performed by Pike and his painter was \$439.29.

The referee then proceeded by his findings to state that the defective work covered by the specifications, and not remedied by Pike, consisted of "maple flooring in the halls, in which some cases second-class material was used, and the floors themselves in some cases present an uneven surface, caused by settling of the building. The window-frames in rooms in the rear of the building were not set to correspond in height with the doors in said rear rooms, and the hand-rail on front stairs was patched, and there was defective work in the bath-rooms, window-casings, and closet shelves, but the said defects do not prevent the use of the building for the purposes in-

tended." And that the fair value of the labor and materials necessary to remedy such defective work not remedied by Pike and his painter was \$205. He also found that the Wadsworths failed to provide iron transom-guards for rear doors and iron registers for front, for which deduction of twelve dollars should be made. And he added that when Pike had completed his work before mentioned, and on or about September 21, 1887, the defendant took and has since remained in possession of the building and has rented portions of it to tenants. Although there is a conflict in the evidence in respect to some of such findings, there is in the record some evidence tending to support all of them, and for the purposes of this review they must, therefore, be deemed conclusive of the facts so found by him.

While the condition of the carpenter-work when the Wadsworths left it in July was such as to indicate defects and omissions, the correction of which would cost \$656.29, it may be observed that such defects upon such estimate of the cost to the amount of \$439.29 were remedied through the action of the defendant taken pursuant to his right reserved by the contract, to furnish materials and workmen to proceed with the work and charge the expense to the contractor upon the failure of the latter to do it in on three days' notice to him to that effect. This work having been done by the defendant in the exercise, by his election, of such right, he cannot effectually assert forfeiture in respect to the deficiency so supplied, but the Wadsworths were entitled to the benefit of the work thus produced, and were chargeable to the defendant for the amount of the expense incurred by him in doing it: *Murphy v. Buckman*, 66 N. Y. 297. When the application for the architect's certificate was made, this work had been done and the defects in the work to that extent removed, and in other respects the work could then have been made to conform to the specifications by the appropriation to that purpose of the sum of \$216.71. This was the situation when the architect was requested by the plaintiffs to make certificate for payment of final estimate. If the work was then substantially performed as found by the referee, the conclusion was warranted that the refusal of the architect to give any certificate was unreasonable in the legal sense applicable to it for the purposes of relief: *Nolan v. Whitney*, 88 N. Y. 648.

The amount of damages for want of strict performance was not such as to necessarily defeat the claim of substantial per-

formance: *Phillip v. Gallant*, 62 N. Y. 256. The cost of completion of work by remedying defects or supplying omissions in it to meet the requirement of a contract may be so great as to preclude the conclusion of substantial performance.

In *Flaherty v. Miner*, 123 N. Y. 382, where the damages allowed were upwards of seventeen per cent of the contract price, the court suggested (without deciding) that if it had appeared "without dispute that such a substantial portion of the work remained undone, and objection had been properly taken, it may well be that the plaintiff could not have recovered upon the theory of a substantial performance." It is suggested that it was not within the province of the architect's duty to make deductions for defective work, or to determine what less than exact or full completion of the work, according to the contract, was such substantial performance as to permit recovery. That may be true in such sense that the refusal of a certificate may, on his part, have been without purpose to deny to the contractor that to which he may have been entitled, and yet it may be determined on trial that the certificate was unreasonably withheld. The considerations of good faith on the part of the contractor bearing upon the question whether the defective work was willful or unintentional and inadvertent the architect may not be willing to determine. But if he gives a certificate founded upon final estimate that the work is substantially performed, the right to abate recovery for defects in the work is not necessarily defeated.

In *Phillip v. Gallant*, 62 N. Y. 257, where the contract price of the work was \$865.11, and the damages allowed for defective work was \$75, the question of substantial performance was held to be one of fact, and the amount of damages was not treated as inconsistent with the conclusion to that effect. And see *Van Clief v. Van Vechten*, 130 N. Y. 571.

The rule of substantial performance should not be extended beyond the purpose in view when the relaxation of the strict performance was adopted, which was founded upon equitable considerations in furtherance of justice, and made applicable to cases of honest intention of contractors to fairly perform their contracts, and who shall in the main have done so, with only slight defects or omissions inadvertently and unintentionally caused and appearing in the work. The present is a case not free from difficulty in that respect,—not less so in the extent of the deficiencies than in the character of some of them.

The fact that the windows in the rear of the building were not in align with the doors, and were differently cased, were features not in accordance with the specifications, and would seem to have been apparent to observation reasonably diligent. Yet the Wadsworths testify to the effect that they supposed that they had completed the carpentry work according to the contract. The inference was permitted, as the result showed, that they may have placed too much reliance upon the care and skill of their employees. And it does not appear that their attention was, by the defendant or his architect, called during the progress of the work to those defects in such windows and casings, although payments were from time to time made upon the certificates of the latter to those contractors. The referee, however, was, by stipulation of the parties, given the opportunity, which he made available, of viewing the premises and making personal inspection of the work, and he may have acquired such aid in considering the evidence of the witnesses as might thus be afforded him. And it cannot now, in view of the evidence, and against his findings, be held, as matter of law, that the defects, or any of them, were willfully caused or permitted by the contractors. Whatever view we may have taken of the weight of evidence on the questions of fact upon the subject, those findings in that respect approved by the court below must be deemed conclusive on this review. The time within which the contractor undertook to perform the work was an essential element in the contract, which provided for stipulated damages at the rate of ten dollars per day for the period of delay in that respect arising from his act or default, subject, however, to the right to such extension of time as might be rendered reasonable by strike of workmen, to whose demands the contractor was not required to yield. In the settlement made by the defendant, through his architect, with the original contractor, damages at such rate were allowed to defendant for delay for the entire time from April 1 to August 8, 1887, when such settlement was made. And no claim of that character, up to that time, arises in this action. It seems that the carpenter-work which the subcontractors undertook to perform was not made the subject of that settlement, but was eliminated from it. And assuming that any delay in such work subsequent to that time, and prior to the time the possession of the building was made available to the defendant, was properly the subject of consideration in the present action, the question arises, whether any and what

amount of damages for that cause are chargeable by way of abatement of the alleged claim of the plaintiff. The work which the defendant, following the three days' notice before mentioned, caused to be performed was not completed until about the 21st of September, 1887, when he took possession of the building. Thus intervened a period of upwards of forty days after the time up to which the matter of delay had been adjusted with the original contractor. The referee has found that the subcontractors were delayed in the work two or three weeks by a strike of workmen, four or five days awaiting the decision of the defendant in respect to certain specified work, and that they were hindered and delayed by the plumbers at various times, covering a period of thirty days. He also found that they performed some extra work, amounting to \$260, the time occupied in doing which does not appear. The plumbers did their work under a contract with defendant independent of his contract with Stauchen. In view of those facts taken as true, and which there is some evidence tending to prove, it would seem that delay in the carpenter-work for a time at least equal to that from August 8th to September 21st did not "arise from any act or default on the part of the" contractors; and the conclusion was permitted that the defendant in such settlement was allowed all he became entitled to on account of the delay in the work. We have, for the purposes of this question of delay, treated the work before referred to, which the defendant caused to be done, the same as if the subcontractors had performed it themselves, and taken the same time that was occupied in its performance by the person employed by the defendant for that purpose.

There were some other matters made the subject of controversy, and to which the defendant's exceptions call attention, but upon careful examination of the record it is found that none of the findings or refusal to find of the referee are wholly unsupported by evidence. None of the exceptions seem to have been well taken.

The judgment should be affirmed.

FOLIETT, C. J. (dissenting). The prevailing opinion goes further than any previous judgment has gone in the direction of holding that the question of "substantial performance" is always one of fact.

Generally the question is one of fact, but so-called performance may be so partial or defective that it is the duty of the

court to decide, as a matter of law, that the contract has not been so far performed as to entitle the plaintiff to recover upon it. In my opinion, the defective performance found by the referee is sufficient to defeat a recovery on this contract, and besides, the undisputed evidence does not tend to support the finding or conclusion of substantial performance.

The tendency, called equitable, of courts to relieve persons from the performance of engagements deliberately entered into, and in legal effect to make for litigants new contracts which they never entered into, and which it cannot be supposed they ever would have entered into, has been and is being carried to a length which cannot be justified in reason.

I think the judgment should be reversed, and a new trial granted, with costs to abide the event.

BUILDING CONTRACTS — SUBSTANTIAL PERFORMANCE. — The equitable doctrine that a substantial performance of the terms of a contract is sufficient in equity (*Rees v. Smith*, 1 Ohio, 124; 13 Am. Dec. 599; *Menicks v. Falk*, 61 Wis. 623; 50 Am. Rep. 157) has always been deemed peculiarly applicable to the case of a building contract. As the execution of the work requires a considerable time, and the operations are carried on under a more or less strict supervision on the part of the contractee or his agents, there is usually ample opportunity given for drawing attention to defects and allowing the contractor to remedy them by timely alterations. Therefore it is very generally held that, if there is an honest effort to perform the contract according to the letter, and it is substantially fulfilled, the builder is entitled to the reward of his labor, although he may not in every instance have complied with its terms literally: *Linch v. Paris Lumber etc. Co.*, 80 Tex. 23. In such cases, the contractor is entitled to recover the contract price, less the damages suffered by the failure of complete performance: *Flaherty v. Miner*, 123 N. Y. 382; *Gallagher v. Sharpless*, 134 Pa. St. 134; *Moore v. Carter*, 146 Pa. St. 492; *Leeds v. Little*, 42 Minn. 414; *Aetna Iron etc. Works v. Kossuth County*, 79 Iowa, 40. If a portion of the building is so defective that a temporary loss of the use of the premises is involved, such loss is an element of the damages recoverable: *White v. McLaren*, 151 Mass. 553. The general doctrine is, however, subject to the qualification that the contractor is not entitled to recover when the omissions or departures from the contract are intentional, and so substantial as not to be capable of remedy, and an allowance out of the contract price would not give the owner essentially what he contracted for. In such a case the mere fact that the building remains on the land, and the owner enjoys the benefit of it, he having no option to reject it, is not such an acceptance as will imply a promise to pay for it, notwithstanding the non-performance of the special contract: *Elliott v. Caldwell*, 43 Minn. 357. Whether a contract has been substantially performed is a question of fact: *Harlan v. Stufflebeem*, 87 Cal. 508; but the question should not be submitted to the jury, unless the plaintiff presents a case disclosing no willful omission or departure from the terms of the contract: *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19.

BUILDING CONTRACTS — RIGHT OF OWNER TO COMPLETE THE BUILDING ON DEFAULT OF CONTRACTOR. — Where the contract provides that if the

owner fails to comply with the conditions thereof, the architect should be entitled to take possession of the building, this right does not depend upon the mere arbitrary discretion of the architect: *White v. Harrigan*, 41 Minn. 414. If the contractor is delayed in the performance of the work by the unreasonable refusal of the architect to certify that certain installments are due, and consequently fails to complete the contract in the time specified, the owner will be considered to have failed to perform on his part, and so not in a position to terminate the contract and complete the work, and he cannot refuse to pay the value of the work done and materials furnished: *Wright v. Reusens*, 133 N. Y. 298. Where the owner thus reserves the right of completing the work on default of the contractor, and stipulates that he may deduct the expenses from the contract price, or the unpaid residue thereof, and account to the contractor only for the excess thereof, no action will lie in favor of the contractor, if the expenses incurred in completing the house exceed the balance due to the contractor: *Hewlett v. Alexander*, 87 Ala. 193.

BUILDING CONTRACTS — ARCHITECTS' CERTIFICATES. — An agreement in a building contract that there shall be no liability to pay for work except upon the architects' certificates is valid; but if such certificates are arbitrarily and dishonestly withheld, the builder may recover on showing the fact that he has performed the contract according to its terms: *Bentley v. Davidson*, 74 Wis. 420; *Thomas v. Stewart*, 132 N. Y. 580; *Flaherty v. Miner*, 123 N. Y. 382; *Linch v. Paris Lumber etc. Co.*, 80 Tex. 23. The facts that payments have been made from time to time, without requiring strict performance of such conditions, will not be held as a waiver thereof: *Brown v. Winchill*, 3 Wash. 524. And if the certificate must be to the effect that "the work is done in strict accordance with drawings and specifications, and that the architect considers the payment properly due," a mere order signed by the architect, addressed to the owner, requesting him to pay a given sum to the contractor, will not conclude the owner: *Michaelis v. Wolf*, 136 Ill. 68. Where the work is to be paid for in installments, and the time when the contract is to be completed is stated, but the agreement specifies neither the time when nor the contingency upon which the several installments become due, except that the last is to be paid at the date assigned for the completion of the work, the installments will become due, respectively, when such proportion of the work is performed as the particular installment bears to the whole contract price: *Wright v. Reusens*, 133 N. Y. 298.

SMITH v. SMITH.

[124 NEW YORK, 62.]

NEGLECT OMISSION TO READ DEED BEFORE SIGNING IT NOT BAR TO EQUITABLE RELIEF WHEN. — Where an aunt, in whose affection and care for their welfare her nephews and niece confide, and her attorney, whom they know and respect, present to them for execution a deed of land, falsely representing to them that it is an instrument simply empowering her to collect the rents, when in fact it is a deed of bargain and sale conveying the land to her, and they, relying upon such representations, execute the deed without reading it, their omission to read the deed before signing it will not defeat their right to equitable relief,

and to have the deed set aside. The law does not, in such a case, impute inexcusable negligence to an omission of vigilance and care which is procured by the fraud of the wrong-doer.

ACTION to have a deed of real estate from the plaintiffs to the defendant adjudged void, its cancellation directed, and plaintiffs and their sister adjudged to be seised of the land described therein. Other facts are stated in the opinion.

Edward W. S. Johnston, for the appellant.

Horace Graves, for the respondents.

LANDON, J. April 24, 1880, the plaintiffs, together with their sister Mary, executed and delivered to the defendant, their aunt, Margaret Smith, a deed of bargain and sale of the premises described in the complaint for the unpaid nominal consideration of one dollar.

The plaintiffs and their sister, Mary Ann Smith Madden, were the sole heirs of their mother, Hannah Smith, who died, in 1876, intestate. Hannah Smith and the defendant were sisters, and with their brother, Anthony, said to be an alien and residing in Ireland (but whose rights are not here involved), were the sole heirs of their sister Ann McCool, who died in the city of Brooklyn, in 1875, intestate, seised as owner in fee of the premises in question.

Thus, at the date of the conveyance, the plaintiffs were tenants in common with the defendant and with their sister, and possibly with their uncle, Anthony, of the premises.

The trial court found "that on or about the twenty-fourth day of April, 1880, the defendant and one Tilton, an attorney at law, at the request of the defendant, presented to the plaintiffs and said Mary Ann Smith Madden (their sister), for signature and execution, a deed of bargain and sale conveying said real property to the defendant; that on the presentation of said deed to the plaintiffs the said defendant and the said Tilton knowingly and falsely represented to the plaintiffs that the said deed was an instrument which gave the defendant only the power to collect the rents of said property, and by said representation, to said Tilton and defendant known to be false, induced said plaintiffs to sign said instrument without reading it; that plaintiffs signed and executed said deed without reading it, relying on the representations of said Tilton and defendant, Smith, and believing it as represented as aforesaid to be only a power of attorney to collect rents, and relying on the professional knowledge of said Tilton and the affection

and good-will of the defendant as their aunt, and that the defendant and said Tilton conspired to deceive the plaintiffs and fraudulently to induce them to sign and execute said deed to defraud the plaintiffs of their title to and interest in said property as heirs at law of their mother, Hannah Smith."

The appellant excepts to these findings as without support in the evidence and contrary to the evidence. The exceptions are not well taken. The representations as found were distinctly testified to by the plaintiffs.

It appears that upon the death of the plaintiffs' mother in 1876 the defendant took sole charge of the premises and collected the rents. Plaintiffs' father had long been dead, and the defendant, their aunt, who had no children of her own, took the plaintiff Robert and his sister, Mary, both then minors, to her home and provided for them. Defendant's husband afterwards furnished Robert employment. The plaintiff Thomas provided for himself, and lived apart.

Although the trial court found that the defendant did not stand *in loco parentis* to the plaintiffs, the court could collect from the evidence that the plaintiffs were grateful for the motherly offices she had rendered them, and for her care for their welfare, and that they confided in her affection for them. At the time of the execution of the deed, Robert was twenty-three years of age and Thomas twenty-seven. Just what their rights were in the premises they did not know, but as their aunt had no children, it is not difficult to believe the testimony of one of the plaintiffs that he supposed "there might be something when the old folks died."

The plaintiffs knew and respected the attorney who accompanied the defendant. Under such circumstances, the testimony of the plaintiffs, that they did not distrust their aunt, and were willing to comply with the request they understood her to make, is credible. That she should have the legal power to collect the rents seems reasonable; but that they should give their interest in this property to their aunt, or that she should ask them to do so, seems not to have occurred to their minds. True, they were able to read, and might have read the instrument if they had wished to do so. They had intelligence enough to understand the effect of the deed if they had read it, but the circumstances under which they were approached, and the representations made, and their relations to their aunt and confidence in her, put them off their guard, if indeed it could have occurred to them to be

on their guard against her. They were thus prevented from reading the instrument.

The learned counsel for the defendant cites numerous cases, mostly from other states, to support his contention that plaintiffs' negligence in not reading the deed defeats their appeal to equity to relieve them from it. The law of this state, as stated in *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40, is not so harsh as in some of the cases cited.

It does not, in cases like this, impute inexcusable negligence to that omission of vigilance and care which is procured by the fraud of the wrong-doer.

Negligence is not an apt term to define the plaintiffs' share in the transaction. The plaintiffs' action or omission was the natural result of their relations with the defendant, the impulse of their affection and confidence. They were prompt to confer the favor the words of their aunt seemed to solicit. Her request excited no suspicion, and they entertained none. What she asked they thought was right because it was she that asked it, and because she was supported by the attorney, whom they respected, and whose presence and participation were the assurance that it was legally right.

In the case cited, the defendant was sought to be charged with the deficiency in foreclosure because of a clause in her deed from the mortgagor reciting the mortgage, and that she assumed it and agreed to pay it. She alleged and offered to prove that she had not assumed or agreed to pay it, and that her grantor, to whom she intrusted the preparation of the deed, had fraudulently procured the clause to be inserted, and that she accepted the deed without knowledge of the existence of the clause. The general term held that her failure to examine the deed and know its contents was such negligence as defeated her prayer for relief against the covenant, but this court reversed the judgment. The court said the defendant "was not bound to assume that he [the grantor] was practicing a fraud upon her or representing a falsehood, and she cannot be charged with negligence in believing confidently that he was acting in good faith and telling the truth."

In that case the grantee was dealing at arm's-length with the grantor, without any peculiar circumstances tending to lull vigilance or care, such as fortify this case.

The defendant excepted to several refusals of the court to find as requested. Some of the propositions of fact requested were established by uncontradicted evidence. But a careful

examination leads to the conclusion that these facts were not pertinent to any of the issues, and if found as requested, could not properly affect the result.

There was no reversible error in the refusal.

The judgment should be affirmed, with costs.

REFORMATION OF WRITTEN INSTRUMENTS ON THE GROUND OF MISTAKE: See note to *Miles v. Stevens*, 45 Am. Dec. 631-634. As a general rule, mistake in a written instrument is not a ground for relief, unless the mistake is mutual: *Benson v. Markoe*, 87 Minn. 30; 5 Am. St. Rep. 816; *Sawyer v. Hovey*, 3 Allen, 331; 81 Am. Dec. 659; *Bodwell v. Heaton*, 40 Kan. 36; *De Voia v. De Voia*, 76 Wis. 66; the ground of relief in such cases being that the instrument fails to express the intention which the parties had in making the contract which it purports to contain: *Minot v. Tilton*, 64 N. H. 371. Accordingly, ignorance of a stipulation in a contract, on the part of one of the parties, does not constitute a ground for relief, where the mistake is to be ascribed solely to his own carelessness or inattention, and there is no evidence that he was misled by a misrepresentation or concealment of the facts: *Robertson v. Smith*, 11 Tex. 211; 60 Am. Dec. 234. Thus the mere fact that the insured did not know that his policy contained a certain provision is not ground for reformation: *McCormick v. Orient Ins. Co.*, 86 Cal. 260. Nor will the court, in the absence of mutual mistake, fraud, or concealment, grant reformation of an instrument, where the plaintiff executed it without reading it, the instrument having been sent to him by his attorney, and he supposing it was a copy of a different one previously executed by him: *Kennerty v. Etivon Phosphate Co.*, 21 S. C. 226; 53 Am. Rep. 669. And, generally, equity will not relieve on the ground of ignorance of facts which the party could have ascertained by the exercise of due diligence: *Fahie v. Pressey*, 2 Or. 23; 80 Am. Dec. 401; *Wier v. Johns*, 14 Col. 493. But an instrument will be reformed, when, by the fraud of one of the parties to it, the language inserted in it is materially different from that agreed upon: *Koons v. Blanton*, 129 Ind. 383. In *May v. San Antonio etc. Co.*, 83 Tex. 502, the rule was said to be, that no relief can be granted on account of a mistake entirely unilateral, unless fraud was involved; and the principle was applied to a case in which it was sought to correct a deed, the terms of which were clear, and understood by the grantee to express the agreement, while the grantor had ample means of understanding it before executing. But in *Pennybacker v. Laidley*, 33 W. Va. 624, the court seems to intimate that if there is a strong, clear, and convincing proof of mistake, relief may be granted, even where no fraud or deception has been practiced, and where a person of ordinary intelligence, who can read, has deliberately executed a deed, in which the mistake is alleged to have been made. This statement of the doctrine, however, seems to be scarcely justified by the authorities, which, we think, will be found to deny relief under such circumstances, unless the mistake is accompanied by fraud, or by some abuse of fiduciary or quasi fiduciary relations, from which fraud is implied: See *Metropolitan Loan Ass'n v. Eads*, 75 Cal. 512.

BLAKE v. VOIGT.

[184 NEW YORK, 69.]

STATUTE OF FRAUDS — CONTRACT TAKEN OUT OF, BY RESERVATION OF OPTION TO TERMINATE WITHIN YEAR. — A verbal contract which, by the terms applicable to the leading subject thereof, is not to be performed within a year is taken out of the operation of the statute of frauds by the fact that it is a part of such contract that either party may rightfully terminate it within the year. When, therefore, two parties enter into a verbal contract, whereby one of them agrees to procure consignments of goods to the other for one year from the first day of December, and the latter agrees to pay a commission on such consignments, but such contract permits either party to terminate it in the following June, and one of them does so terminate it, the reservation of the option to terminate takes the contract out of the operation of the statute of frauds.

ACTION to recover commissions alleged to be due to the plaintiff from the defendants under the contract referred to in the opinion. The defendants pleaded that the agreement was not in writing, and was therefore void under the statute of frauds, because, by its terms, it was not to be performed within one year from the making thereof. Other facts are stated in the opinion.

Charles E. Hughes, for the appellants.

C. Bainbridge Smith, for the respondent.

VANN, J. In the month of November, 1888, the plaintiff was engaged in business at Rockville, Connecticut, and the defendants were commission merchants in the city of New York. During that month the plaintiff had several interviews with one of the defendants, the result of which, as stated by him in his testimony, "was, that I was to cause to be consigned all the goods that I could influence to him, for which I was to receive one and one-half per cent commission on the sales of such goods, and he requested me to put that in writing in the form of a letter to him, which I did, and delivered to him in person." The letter, which bore the date of its delivery, November 27, 1888, was signed by the plaintiff and addressed to the defendants, but was not signed by them. It referred to the interviews that the parties had "had together relating to forming business relations," and after stating as the result thereof the agreement alleged in the complaint, closed in these words: "This agreement to take place and effect December 1, 1888, for one year." The plaintiff testified that the letter embraced the agreement as previously made; that he delivered it to one of the defendants, who read it, and

said it was correct, but added, "that on June following this, either party could make the contract null and void by due notice, — null and void as to continuance," to which the plaintiff assented. Pursuant to the agreement, the plaintiff procured goods to be consigned to the defendants at various times prior to June, 3, 1889, when it was terminated by them under the option permitting it.

The main question requiring discussion is, whether the trial court erred in denying the motion of the defendants to dismiss the complaint upon the ground that the agreement in question was void under the statute of frauds, because it "could not, according to its terms, be performed within one year, and was not reduced to writing and subscribed by the party to be charged."

The learned general term of the city court gave no reasons for its decision, but the court of common pleas, in construing the last clause of the letter, held that, although the minds of the parties met on the 27th of November, the agreement did not "take place" until the 1st of December, because they expressly deferred the "making of it" until the latter date. There is no evidence, however, tending to show that any agreement was in fact made on the 1st of December, or that the parties had any negotiations after November 27th. The agreement, therefore, was actually made in November; and if the parties provided as a part thereof that it was not to be an agreement until the 1st of the following month, that provision was an essential part of the whole, and was clearly in force prior to the 1st of December.

We think that the natural construction of the clause under consideration requires us to hold that the parties intended thereby to simply fix the date when the agreement was to go into practical effect by the consignment of goods, and it appears that the first consignment was actually made on the day thus designated.

We are also of the opinion that the agreement made November 27, 1887, was to continue for one year from December 1, 1888, unless terminated under the option reserved by the parties. The expression "one year," as the context shows, refers to the date which immediately precedes it, and not to the date when the agreement was made, which is not expressly mentioned in any part of the letter. Thus actual performance of the business in contemplation was to begin on that day, and was to continue for one year thereafter.

We are hence brought to the question whether the reservation of an option to terminate the contract within the year took it out of the operation of the statute. We agree with the learned counsel for the defendants that the actual termination of the agreement within the year does not affect the question, as the contract must be construed as it stood when it was made: *Browne on Statute of Frauds*, sec. 279.

The ultimate question therefore is, whether a contract, which, by the terms applicable to the leading subject thereof, is not to be performed within a year, is taken out of the statute by the fact that it was a part of such contract that either party might rightfully terminate it within the year. It is contended that termination is not performance, but rather the destruction, of the contract, and this is true where there is no provision authorizing either of the parties to terminate as a matter of right. Performance, however, is simply carrying out the contract by doing what it requires or permits. The contract under consideration required the plaintiff to procure consignments of goods to the defendants during one year from December 1, 1888, and that they should pay him a commission therefor, but it permitted either party to terminate it in June, 1889. The permission was part of the agreement, and effective action under it was performance of that part. The contract could be performed in either of two ways: 1. By performance according to its terms, without exercising the option. 2. By performance according to its terms until June, and then exercising the option. By either mode the contract would be fulfilled in a sense originally contemplated by the parties, and by neither would performance be frustrated, because the contract would be executed in a way that the parties agreed that it might be executed. The contingency did not defeat the contract, but simply advanced the period of fulfillment. The statute applies to "every agreement that, by its terms, is not to be performed within one year from the making thereof": 4 Rev. Stats., 8th ed., p. 2590, sec. 2.

As it was the design of the statute not to trust the memory of witnesses beyond one year, it has been repeatedly held that it does not apply to a contract which, consistently with its terms, may be performed within that period. The contract in question, therefore, as we construe it, is free from the restraint of the statute. This conclusion finds support in the adjudged cases, which, although uniform in this state, are somewhat at variance in other jurisdictions.

In *Trustees First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, the action was upon a fire insurance policy dated July 21, 1845, for one year, renewed July 21, 1846, for a second year, and July 21, 1847, for a third year. The property insured was destroyed by fire September 10, 1848. While the original policy was running, the parties agreed verbally that until notice to the contrary should be given by one to the other, the defendant should renew the policy from year to year, without further notice, and give a certificate of renewal, that the plaintiff should pay the premium therefor on demand, and the two renewal certificates were given pursuant to such agreement. The court, in declaring the agreement valid, said: "It is not the meaning of the statute that the contract must be performed within a year. If it can be so performed consistently with the language in which the parties have expressed themselves, — in other words, if the obligation of the contract is not, by its very terms or necessary construction, to endure for a longer period than one year, — it is a valid agreement, although it may be capable of an indefinite continuance. An agreement which either party can terminate at any time by a notice to the other may be binding so long as the notice is not given, but it is not within the language or policy of the statute": *Plimpton v. Curtiss*, 15 Wend. 336; *Moore v. Fox*, 10 Johns. 244; 6 Am. Dec. 338; *Fenton v. Emblers*, 3 Burr. 1279; 2 Parsons on Contracts, 316.

The case came before the court a second time, when the first decision was expressly approved: 28 N. Y. 153, 163; and although repeatedly cited since, it has never been criticised, so far as our investigation has discovered: *Kent v. Kent*, 62 N. Y. 560, 564; 20 Am. Rep. 502; *Van Woert v. Albany etc. R. R. Co.*, 67 N. Y. 538, 542.

In *Smith v. Conlin*, 19 Hun, 234, the plaintiff verbally agreed with the defendants, in October, 1876, to teach school until October 1, 1877, and a year longer if no notice should be given by either party at least two weeks prior to the expiration of the first year that the services should then cease. After a careful review of the authorities, it was held that the agreement was not within the statute, although one of the learned justices dissented from that conclusion. The subject is illustrated by the following cases, which were not controlled by the statute: An agreement to continue "as long as the parties are mutually satisfied": *Greene v. Harris*, 9 R. I. 401; or for two years, or "until I have made the net profit of fifty thou-

sand dollars": *Hodges v. Richmond Mfg. Co.*, 9 R. I. 482; or to work until an infant became of age, although that event could not occur for seven years: *Peters v. Westborough*, 19 Pick. 364; 31 Am. Dec. 142; or "for the term of five years, or so long as A shall continue to be agent of" a certain company: *Roberts v. Rockbottom Co.*, 7 Met. 46; or to cut trees at any time within ten years: *Kent v. Kent*, 18 Pick. 569; or any agreement which provides *prima facie* for a performance beyond the year, provided it can, consistently with its terms, be fulfilled within that time; *Peter v. Compton*, 1 Smith's Lead. Cas., 7th ed., 577, note 581; see also *Warren Chemical etc. Co. v. Holbrook*, 118 N. Y. 586, 593; 16 Am. St. Rep. 788; *Dresser v. Dresser*, 35 Barb. 573; *McLees v. Hale*, 10 Wend. 426; *Barlingame v. Manderville*, 7 N. Y. St. Rep. 858; Browne on Statute of Frauds, sec. 281; 1 Reed on Statute of Frauds, 197, 201.

Many contracts referred to in the exhaustive note to *Peter v. Compton*, 1 Smith's Lead. Cas. 581, apparently intended to extend longer than one year, were held valid, on account of the implied contingency of death, when that event would necessarily conclude further performance. It is difficult to see why such a contingency, although not named and not necessarily contemplated by the parties, should save a contract, unless a contingency, provided for by express stipulation and acting on the contract in the same way, should have the same effect. If "an agreement to do or to refrain is fully performed by him who keeps it until he is no longer capable of doing or refraining" (*Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80), why is not an agreement to do or refrain fully performed by one who keeps it until he can no longer do or refrain, because by the authorized action of the other party the contract is terminated? The possibility of further performance is effectually ended in either case, and the contract is as necessarily completed by the one event as the other. While the whole contract hangs on life in the one instance, it hangs on the reserved option in the other. Where the parties agree to carry on business for a period exceeding one year, or until the happening of an event which may transpire before the end of the year, we think that, by principle, as well as by the weight of authority, the contract is protected from the operation of the statute.

After examining all of the exceptions that are relied upon to reverse the judgment, we think that it should be affirmed, with costs.

CONTRACTS—STATUTE OF FRAUDS—EFFECT OF POSSIBILITY OF PERFORMANCE WITHIN A YEAR. — To bring an agreement within the statute, it must be an express and specific agreement, not to be performed within the year: *Moore v. Fox*, 10 Johns. 244; 6 Am. Dec. 338; *Lapham v. Whipple*, 8 Met. 59; 41 Am. Dec. 487; *Houghton v. Houghton*, 14 Ind. 505; 77 Am. Dec. 69; *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80; *Lockwood v. Barnes*, 3 Hill, 128; 38 Am. Dec. 620; *Peters v. Westborough*, 19 Pick. 364; 31 Am. Dec. 142; *Linscott v. McIntire*, 15 Me. 201; 33 Am. Dec. 602; *Gadsden v. Lance*, 1 McMull. Eq. 87; 37 Am. Dec. 548; *Lyon v. King*, 11 Met. 411; 45 Am. Dec. 219; *Blanding v. Sargent*, 33 N. H. 239; 66 Am. Dec. 720. The cases in the series which maintain the doctrine, referred to by the court in the principal case, that agreements which were apparently intended to extend beyond a year may be held valid, though not in writing, on account of the contingency of death, where that event would necessarily conclude further performance, are: *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80; *Peters v. Westborough*, 19 Pick. 364; 31 Am. Dec. 142; *Lyon v. King*, 11 Met. 411; 45 Am. Dec. 219; *Hill v. Jamieson*, 16 Ind. 125; 79 Am. Dec. 414.

ROBERTSON v. SAYRE.

[184 NEW YORK, 97.]

FRAUDULENT CONVEYANCE, DEBTOR PROCURING, TO BE MADE TO ANOTHER ACQUIRES NO ESTATE THEREBY. — A debtor who, being financially embarrassed, purchases land, and, for the purpose of hindering and delaying his creditors, takes the deed in the name of another person, has no legal estate in the property so conveyed which can be reached by execution, or which, on his death, will descend to his heirs; and if, after the death of such debtor, the person to whom the conveyance was made conveys the land to a third person, without consideration, except an oral agreement that in case any of the heirs of the deceased should turn up in distress, he will help them to the extent of one or two hundred dollars, such third person is not liable to the heirs of said deceased in an action brought against him by them for an accounting, and to compel him to pay to them the value of the land, less the sums paid by him for taxes and improvements.

In January, 1841, David H. Robertson, being then financially embarrassed, purchased two lots in Harlem for fifty dollars, and for the purpose of hindering and delaying his creditors, had them conveyed to Thomas H. H. Messenger, without the latter's knowledge or authority. When Robertson informed Messenger of the transaction, the latter was greatly offended, and permanently severed their previous friendly relations. Robertson died in 1851. Neither he nor Messenger ever took possession of the lots, or paid any taxes thereon. On the 25th of November, 1881, Messenger, who, until reminded of the fact, had forgotten that the lots had been conveyed to him, by quitclaim deed conveyed them to the

defendant. Messenger then knew that Robertson was dead, but did not know where his heirs were living. He would have conveyed the lots, which were then worth about ten thousand dollars, to the heirs of Robertson if he had been requested. He did not know their value. No consideration was paid, but the defendant orally agreed that if the heirs of Robertson should turn up in distress, he would help them to the extent of one or two hundred dollars. After the lots were conveyed to the defendant, he redeemed them from the tax sales. The plaintiffs sought an accounting, and that the defendant be compelled to pay to them the value of the lots, less such sums as he had expended in the payment of taxes and for improvements. Other facts appear from the opinion.

V. Van Dyck, for the appellants.

B. D. Penfield, for the respondent.

FOLLETT, C. J. The learned counsel for the plaintiffs insists in his first point that title to the lots was never vested in Messenger, because he says a valid delivery of the deed and an acceptance of it by him were not proved. The plaintiffs are not in a position to raise this question, for they alleged in the fourth division of their complaint that the legal title to the lots in question was in Messenger until he conveyed them to the defendant. This allegation was not controverted by the answer. It was not found as a fact nor as a conclusion of law that there was not a valid delivery of the deed from the master in chancery to Messenger, nor was the referee requested by either party to so find or hold. But if this position could be maintained, it would not aid the plaintiffs, for the result would be, that the title of the owner of the fee when the mortgage was foreclosed was not divested by the master's deed, and both the plaintiffs and defendant would be without title to the lots.

David H. Robertson, having procured these lots to be conveyed to Messenger for the purpose of defrauding his creditors, had no legal estate in them which could be reached by execution: *Garfield v. Hatmaker*, 15 N. Y. 475; or which, on his death, descended to his heirs: *Moseley v. Moseley*, 15 N. Y. 334; Wait on Fraudulent Conveyances, sec. 121. See also 1 Rev. Stats., p. 728, secs. 50-52; *Underwood v. Sutcliffe*, 77 N. Y. 58; *Brewster v. Power*, 10 Paige, 562; *Bates v. Lidgerwood Mfg. Co.*, 50 Hun, 420; *Hamilton v. Cone*, 99 Mass. 478. This rule is a penalty imposed by the law for the prevention

Of frauds and for the protection of subsequent purchasers: Reviser's notes to sections cited; and the reason for its application is not weakened in case the grantee, as in the case at bar, was not a participant in the fraud.

It is clear that neither Robertson in his lifetime, nor his heirs since his death, could have recovered the lands or its proceeds from Messenger, or from his grantee, by any legal or equitable remedy: See the authorities above cited. It is alleged in the complaint that David H. Robertson was the owner of the mortgage which was foreclosed, but no such fact was found. On the contrary, the facts found compel the inference that he had no interest in the mortgage nor in the land covered by it.

Proceeding on the assumption that the deed to Messenger vested the legal title in him, did the agreement which the learned referee found was made between the defendant and Messenger create a legal or equitable interest in the lots in favor of the plaintiffs? or did it raise a liability on the part of the defendant in favor of the plaintiffs which can be enforced in this action? The referee finds: "He (Messenger) was told by defendant that they (the lots) had been sold for taxes, but could be redeemed; he (Messenger) then knew that David H. Robertson and his oldest son and daughter were dead, and that the other children were scattered, but living at places unknown to him; and after some conversation touching a supposed interest of defendant in the lots (and which is referred to in the deed), he said to defendant, 'I will tell you what I will do: if any of Mr. Robertson's heirs should turn up in distress, I will transfer this property to you, providing you will help them'; to which defendant said, 'Agreed; I will do so'; and when asked the amount, said Messenger named one or two hundred dollars, that being about the value of the lots when they came to his hands."

On that occasion a quitclaim deed was made and executed by Messenger to the defendant, granting all his right, title, and interest in the lots, under which deed defendant holds the same, for which no actual consideration was paid, but the sole consideration was the promise hereinabove stated.

This action was not brought to enforce the agreement, nor do the findings show the existence of facts creating a liability under it. There is no finding or request to find that the defendant procured the conveyance to be made by the false representations of himself or of his attorney. We think the

facts found do not establish any liability on the part of the defendant to the plaintiffs which can be enforced in this action. As before remarked, the evidence given on the trial is not contained in the record, and so this court has no means of ascertaining the merits of the controversy, except as disclosed by the decision of the referee. For some reason, which we must assume was justified by the evidence, the learned referee refused to allow the defendant costs, and no costs were allowed him at general term. Following the views of the courts below upon the question of costs, the defendant will be denied them in this court.

The judgment should be affirmed, without costs.

FRAUDULENT CONVEYANCES, RIGHTS OF PARTIES TO. — A large number of cases illustrating the principle that conveyances or other transactions intended to defraud creditors are valid between the parties themselves will be found in the monographic notes to *Boyd v. Barclay*, 34 Am. Dec. 765-767, and *Whitworth v. Thomas*, 3 Am. St. Rep. 727-745. As to the binding effect of such conveyances on the heirs or other privies of the grantor, see page 729 of the last-mentioned note. If a debtor buys land, paying for it with his own means, and with the intent of fraudulently placing it beyond the reach of his creditors, the land becomes subject to the debts of the fraudulent grantee, and the right of his creditors to have it sold in payment of his debts cannot be defeated by a subsequent voluntary conveyance to his fraudulent grantor: *Keel v. Larkin*, 83 Ala. 142; 3 Am. St. Rep. 702. So a contract by which an apparent vendee agrees to sell the property as his own, and after deducting the amount of certain loans and advances made to the vendor, to repay to the vendor the excess of the proceeds of the sale, the principal object being to defeat the claims of certain judgment creditors of the transferor, is fraudulent, and no action will lie by the transferor or his representatives to recover the surplus agreed to be repaid: *Gravies v. Carraby*, 17 La. 118; 36 Am. Dec. 608.

VAN ETTEN v. NEWTON.

[134 NEW YORK, 142.]

DEMURRAGE, DAMAGES IN NATURE OF, RECOVERABLE FROM CONSIGNOR WHEN. — Where no provision is made in a bill of lading for the payment of demurrage by the consignee, damages in the nature of demurrage may be recovered from the consignor in case he detains the vessel for loading for an unreasonable time.

BILL OF LADING IS CONTRACT WHOSE TERMS CANNOT BE VARIED BY PAROL EVIDENCE. — The acceptance of a bill of lading by the shipper, with knowledge of its contents, makes it a binding contract, and defines the rights and liabilities of the parties to it. The bill of lading is both a receipt and a contract. As a receipt, it is explainable as between the shipper and the carrier; but parol evidence is not admissible to vary the terms of that portion of it constituting the contract.

CONSIGNOR'S ACCEPTANCE OF BILL OF LADING MAKES HIM SHIPPER WHEN.

— When a consignor accepts a bill of lading in which he is named as shipper, his acceptance creates a contract which fixes his relation as such, and imposes upon him the obligations which the law has previously declared to be assumed by those entering into such a contract. The fact that the consignee takes part in the negotiations as to the rate of freight to be paid does not constitute him the shipper.

ACTION to recover damages in the nature of demurrage for the unreasonable detention of the plaintiff's vessel. Merritt Clark's Sons purchased a cargo of coal from the defendants on May 7, 1888, and at the same time directed them to advise the plaintiff to call upon them in relation to the freight of the cargo. Merritt Clark's Sons fixed the rate of freight. The plaintiff called upon the defendants the following day at their request, and informed him that he did not wish to take the cargo unless it could be promptly loaded. They assured him that the coal would be ready for loading on the 10th of May. The first coal was put in his boat on the 15th of May, and the balance of the cargo was loaded on the 17th of May. It was admitted that if the coal had been ready for loading, the boat could have been loaded in five hours. Other facts appear from the opinion.

De Lagnel Berier, for the appellants.

Nelson Zabriskie, for the respondent.

PARKER, J. The evidence is ample to support the judgment rendered, provided the defendants are legally chargeable with any damages whatever by way of demurrage. That question alone requires consideration on this review.

When a bill of lading contains a stipulation for demurrage, the acceptance of the goods is evidence of an agreement on the part of the consignee to pay both freight and demurrage: *Jesson v. Solly*, 4 Taunt. 52; *Wegener v. Smith*, 15 Com. B. 285.

But in the absence of such a stipulation, it is generally held that the consignee is not bound to respond in damages in the nature of demurrage, because, not being a party to the contract in the bill of lading, the contract implied from its subsequent acceptance by him cannot extend beyond the conditions upon which its delivery is made dependent: *Gage v. Morse*, 12 Allen, 410; 90 Am. Dec. 155; *Young v. Moeller*, 5 El. & B. 755. A delay at the place of delivery, occasioned by the fault of the consignee, furnishes an exception to the rule: *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Crawford v. Mellor*, 1 Fed. Rep. 638. Here the direct contract of the plaintiff under the bill of lad-

ing was with the defendants, who were the shippers of the coal: *Blanchard v. Page*, 8 Gray, 281, 290, 295. Merritt Clark & Co., the consignees, were not parties to it. The delay complained of was not due to any fault on their part. It did not occur at the place of delivery, but at Perth Amboy, where the vessel was loaded. Within the rules alluded to, therefore, the consignees were not liable, as the bill of lading contained no stipulation that the consignees should pay demurrage.

Under a contract of affreightment the shipper is liable for the freight, although, as in this case, it provides for the collection of the freight from the consignee. The ship-owner is not entitled to payment unless he performs his part of the contract; and by providing in the bill of lading that the consignee shall pay, performance is first secured by the ship-owner, who is ordinarily amply protected, as he has a lien on the goods carried, for the amount due him, and a cause of action against the consignor in case the consignee refuses to pay and his lien proves insufficient or be lost.

The consignee in such cases, as to payment of freight, being treated as the agent of the consignor.

And if the bill of lading provides for demurrage to be paid by the consignee, the consignor is also liable for its payment in the event that the consignee refuses to pay.

If it be silent on the subject of demurrage in case of detention of the vessel, for loading by the consignor for an unreasonable time, damages in the nature of demurrage may be recovered from him: *Fisher v. Abeel*, 66 Barb. 381.

The contract between these parties did not provide for demurrage, but under it plaintiff was entitled to recover for unreasonable delay.

There was evidence tending to show such delay before the trial court, and it was so found as a fact. The general term, on the argument as well as on the reargument, after carefully considering the evidence in such respect, affirmed the finding, and it is now controlling. So far, the discussion has proceeded on the assumption that the bill of lading constitutes the real contract of affreightment, and the conclusion necessarily following from that position is, that the plaintiff's recovery is well founded.

The appellants contend, however, that the plaintiff was engaged by the consignees to carry the cargo, and therefore the defendants are not liable under the contract, although the delay was unreasonable, and wholly due to their fault.

His contention is founded on evidence to the effect that plaintiff agreed with the consignee as to the rate of freight, and he insists that it follows that the defendants were not liable, notwithstanding the terms of the written contract to which they were parties.

A bill of lading has a twofold character: 1. That of a receipt; and 2. That of a contract.

The receipt as between the shipper and ship-owner is explainable, but parol evidence is not admissible to vary the terms of that portion of it constituting the contract: 1 Parsons on Shipping, 190, and cases cited.

The acceptance of a bill of lading by the shipper, with knowledge of its contents, makes of that instrument a binding contract, and defines the rights and liabilities of the parties to it: *Cincinnati etc. R. R. Co. v. Pontius*, 19 Ohio St. 221; 2 Am. Rep. 391; *Germania Fire Ins. Co. v. Memphis etc. R. R. Co.*, 72 N. Y. 90; 28 Am. Rep. 113.

Now, the defendants do not question the acceptance of the bill of lading with full knowledge of its terms.

The evidence fails even to suggest that there was any understanding or expectation between these parties that their relations were to be other than usually obtains between consignor and ship-owner, and such as are evidenced by this contract, although, without objection, the defendants were permitted to show that the consignees suggested plaintiff for the carrier, and that they agreed with him upon the price to be paid. But such acts are not necessarily inconsistent with the contract which these parties made.

It is usual for the consignee to pay the freight to the ship-owner. Ordinarily, the bill of lading provides that he shall do it. If he be the purchaser as well as the consignee, although treated, for commercial reasons, as the agent of the consignor in making payment, in practical effect the payment is on his own account, and must necessarily be added to the price paid the consignor for the goods, in order to determine the total cost to himself. He is therefore directly interested in fixing the rate of freight, and it is not unusual for him to take part in the negotiations for it. But that fact does not constitute him the shipper. The bill of lading names the shipper, and in this case the defendants are so designated, and the acceptance of it by them created a contract with the plaintiff that their relation to each other was that of shipper and ship-owner,

and that they would severally discharge the obligations which the law had previously declared vested on those entering into such a contract.

In *The M. S. Bacon v. Erie etc. Transp. Co.*, 3 Fed. Rep. 344, the consignee was charged in damages for occasioning delay to the ship-owner, but it appeared that it was also the shipper of the cargo, "and hence, as a party to the contract of affreightment, is accountable for any breach of an obligation imputed by it"; citing *The Hyperion*, 2 Low. 93.

The evidence to which we have referred would doubtless have been excluded had objection been properly made. But as it is before us, we have given it such consideration as it seems to merit, and have reached the conclusion that it cannot operate to nullify, destroy, or impair the written contract subsequently entered into between these parties, by which the defendants declared themselves to be, as they doubtless were in fact, the shippers of the cargo.

The judgment should be affirmed.

BILLS OF LADING — CONCLUSIVENESS OF. — Bill of lading is both a receipt for goods and contract to carry and deliver them: *O'Brien v. Gilchrist*, 34 Me. 554; 56 Am. Dec. 676. So far as it acknowledges the receipt of goods and states their condition, it may be contradicted, but in other respects it is interpreted like other written contracts: *Wayland v. Mosely*, 5 Ala. 430; 39 Am. Dec. 335. This case illustrates the principle that in so far as it is a receipt, it may be controlled by parol evidence. Other cases to the same point are: *O'Brien v. Gilchrist*, 34 Me. 554; 56 Am. Dec. 676; *Portland Bank v. Stubbs*, 6 Mass. 422; 4 Am. Dec. 151; *Strong v. Grand Trunk R. R. Co.*, 15 Mich. 206; 93 Am. Dec. 184. That a bill of lading cannot be varied by parol, see *Cox v. Peterson*, 30 Ala. 608; 68 Am. Dec. 145.

BILLS OF LADING — EFFECT OF ACCEPTANCE BY SHIPPER. — The shipper is bound to examine the bill of lading and ascertain its contents; and if he accepts it without objection, he is bound by its terms, and he cannot set up ignorance of its contents: *Germania Fire Ins. Co. v. Memphis etc. R. R. Co.*, 72 N. Y. 90; 28 Am. Rep. 113; *McMillan v. Michigan Southern etc. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208. So, also, the fair and honest acceptance of a bill of lading without dissent raises a presumption that all limitations contained therein were brought to the shipper's knowledge: *Merchants' D. T. Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847.

DEMURRAGE. — Demurrage, strictly speaking, is a sum of money due and payable by express contract for the detention of a vessel in loading or unloading beyond the period of time allowed for the purpose in the contract of affreightment: *Davis v. Wallace*, 3 Cliff. 123; *Fisher v. Abeel*, 66 Barb. 381; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Morse v. Pesant*, 2 Keyes, 16; *Cross v. Beard*, 26 N. Y. 85; *Wordin v. Bemis*, 32 Conn. 268; 85 Am. Dec. 255. In the case of *Davis v. Wallace*, 3 Cliff. 131, Mr. Justice Clifford said: "Demurrage is the sum fixed by the contract of affreightment as a remuneration to the ship-owner for the detention of the ship beyond the lay-days allowed

for loading or unloading the vessel." And in *Fisher v. Abael*, 66 Barb. 381, Mullin, P. J., delivering the opinion of the court, said: "Demurrage, properly so called, is the compensation provided for in the contract of affreightment for the detention of the vessel beyond the time agreed on for loading or unloading." In this country, however, and especially in the United States courts, the term seems to have a wider application, and embraces all cases of improper detention or delay of a vessel, and, while often, is not always regulated by contract: *Sprague v. West*, 1 Abb. Adm. 548; *Falkenburg v. Clark*, 11 R. I. 278. *The M. S. Bacon v. Erie & W. T. Co.*, 3 Fed. Rep. 344; *The Apollon*, 9 Wheat. 362; *Williamson v. Barrett*, 13 How. 101. Mr. Justice Story, in delivering the opinion of the court in the case of *The Apollon*, 9 Wheat. 377, said: "But it is now said that demurrage always arises *ex contractu*, and therefore cannot furnish any rule of compensation in cases of tort. The practice in courts of admiralty has certainly been otherwise; and the very cases cited at the bar show that no distinction has been taken as to its application between cases of contract and cases of tort. In truth, demurrage is merely an allowance or compensation for the delay or detention of a vessel. It is often a matter of contract, but not necessarily so. The very circumstance that in ordinary commercial voyages a particular sum is deemed by the parties a fair compensation for delays is the very reason why it is, and ought to be, adopted as a measure of compensation in cases *ex delicto*. What fairer rule can be adopted than that which founds itself upon mercantile usage as to indemnity, and fixes a recompense upon the deliberate consideration of all the circumstances attending the usual earnings and expenditures in common voyages? It appears to us that an allowance by way of demurrage is the true measure of damages in all cases of mere detention; for that allowance has reference to the ship's expenses, wear and tear, and common employment. Every other mode of adjusting compensation would be merely speculative, and liable to the greatest uncertainties." And Betts, J., in *Sprague v. West*, 1 Abb. Adm. 554, said: "The suggestion that demurrage can be claimed upon the proof of express contract alone is undoubtedly giving too narrow an effect to the term. Every improper detention of a vessel may be considered demurrage, and compensation in that name be obtained."

Demurrage is only an extended freight or reward to the vessel in compensation for the earnings which she has been improperly caused to lose. And the liability for demurrage stands upon the same footing as liability for freight: *Hall v. Barker*, 64 Me. 339; *Sprague v. West*, 1 Abb. Adm. 548; 5 Am. & Eng. Ency. of Law, 542. Even where it has been held that strict demurrage can be claimed only when provision is made for it in the contract of affreightment, damages in the nature of demurrage have been held to be recoverable by the ship-owner for an unwarranted detention, through the fault of the freighter or consignee: *Wordin v. Bemis*, 32 Conn. 268; 85 Am. Dec. 255; *Lake v. Hurd*, 38 Conn. 536; *Sprague v. West*, 1 Abb. Adm. 548; *Western T. Co. v. Hawley*, 1 Daly, 327; *Morse v. Pesant*, 2 Keyes, 16; Abbott on Shipping, 13th ed., 270.

Demurrage includes the hire and maintenance of the crew: *Benson v. Atwood*, 13 Md. 20; 71 Am. Dec. 611. Wharfage and fees paid to watchmen are also included in the meaning of the term "demurrage": *The C. P. Raymond*, 28 Fed. Rep. 765. Where, therefore, demurrage has been allowed, it is not proper to allow for these things as additional items of damage.

LIABILITY FOR STIPULATED DEMURRAGE ABSOLUTE WHEN. — If the charterer or freighter of a vessel, in the contract of affreightment, expressly

agrees that the vessel shall be loaded or unloaded within a specified number of days, he will be liable absolutely for any detention beyond that time, even though the delay is produced by causes over which he had no control whatever: *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Field v. Chase*, Hill & D. 50; *Cross v. Beard*, 26 N. Y. 85; *Fisher v. Abeel*, 66 Barb. 381; *Sleeper v. Puij*, 17 Blatchf. 36; *Booye v. A Cargo of Dry Boards*, 42 Fed. Rep. 335; *Davis v. Wallace*, 3 Cliff. 123. In the case of *Ford v. Cotesworth*, L. R. 4 Q. B. 134, Blackburn, J., delivering the opinion, said: "We think it firmly established, both by decided cases and on principle, that where a party has either expressly or impliedly undertaken, without any qualification, to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control." And Mr. Justice Clifford, in the case of *Davis v. Wallace*, 3 Cliff. 131, said: "Where the contract is, that the ship shall be unladen within a certain number of days, it is no defense to an action for demurrage that the over-delay was occasioned by the crowded state of the docks, or by port regulations, or governmental restraints. Detention of the vessel for loading or discharging longer than the time allowed by the contract entitles the owner to the stipulated demurrage, although it was impossible to complete the work within that time, by natural causes." When there is a provision for demurrage either in the charter-party or in the bill of lading, that must control: *Hall v. Barker*, 64 Me. 339. And such provision cannot be controlled or modified by usage or custom: *Davis v. Wallace*, 3 Cliff. 123; *The Glenfinlas*, 48 Fed. Rep. 758.

DAMAGES IN NATURE OF DEMURRAGE RECOVERABLE WITHOUT CONTRACT WHEN.—Notwithstanding the absence of any express agreement for demurrage in a contract of affreightment, damages in the nature of demurrage may be recovered against the owner of the cargo, when he improperly detains the vessel beyond a reasonable time for loading or unloading: *Schoff v. Albany etc. Co.*, 101 N. Y. 602; *Fisher v. Abeel*, 66 Barb. 381; *Olendaniel v. Tuckerman*, 17 Barb. 184; *Whitehouse v. Halstead*, 90 Ill. 95; *Hayden v. Whitmore*, 74 Me. 230; *The M. S. Bacon v. Erie & W. T. Co.*, 3 Fed. Rep. 344; *Donaldson v. McDowell*, 1 Holmes, 290; and this although the bill of lading provides that the cargo is to be discharged by the consignee with the assistance of the crew: *Hall v. Barker*, 64 Me. 339.

When the charter-party and bill of lading are silent as to the time to be occupied in unloading a vessel, the contract implied by law is, that each party will use reasonable diligence in performing that part of the delivery which, by the custom of the port, devolves upon him. In such case, the consignee is not in default whilst the landing of the cargo is rendered impossible by causes over which he has no control: *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *The Norman*, 16 Fed. Rep. 879; *Davidson v. Four Hundred Tons of Iron Ore*, 18 Fed. Rep. 94; *Fish v. One Hundred and Fifty Tons of Brown Stone*, 20 Fed. Rep. 201; *Addicks v. Three Hundred and Fifty-four Tons of Crude Kainite*, 23 Fed. Rep. 727. Where a consignee unloads a vessel from only one hatch at a time, thus causing unreasonable delay, the ship-owner is entitled to demurrage: *Mitchell v. Laydon*, 10 Biss. 527. Where a consignee of a vessel sends her to a wharf so crowded that she cannot discharge within the time limited in the charter-party, he will be liable for the detention: *Williams v. Theobald*, 8 Saw. 445. A consignee who fails to furnish a wharf, thus compelling the vessel to discharge by lighters, will be liable for the delay so caused: *The Dictator*, 30 Fed. Rep. 637. And so, generally, where he fails to furnish a proper wharf or suitable place for discharging the cargo: *Olivari*

v. *Merchant*, 18 Fed. Rep. 554; *Booen v. Decker*, 18 Fed. Rep. 751; *Gronstadt v. Withoff*, 21 Fed. Rep. 253; *The Swallow*, 27 Fed. Rep. 316. A consignee who, by the custom of the port, is bound to find a berth for the vessel to discharge at will be liable for the delay caused by his refusal to do so: *Terjeson v. Carter*, 9 Daly, 193; *Clayton v. Four Hundred and Ten Tons of Coal*, 20 Fed. Rep. 799. And the vessel is not bound to enter upon a struggle with other vessels for the possession of the berth, or upon a race to obtain it: *Clayton v. Four Hundred and Ten Tons of Coal*, 20 Fed. Rep. 799. If, through the mistake of the charterer, a delay occurs in loading or discharging the cargo, he will be liable therefor: *The Pietro G.*, 38 Fed. Rep. 148; *Oreighton v. Dilks*, 49 Fed. Rep. 107. In the former of these cases, the charterer, by mistake, fixed too early a day for the arrival of the ship. In the latter, a delay was caused by an employee of the charterer erroneously pointing out some iron as a part of the cargo to be taken aboard, and which had to be unloaded again when the mistake was discovered. And the owner of a cargo who unreasonably delays unloading a vessel after her arrival at the designated wharf is liable to the owner of the vessel for demurrage, although by the terms of his purchase the vessel was employed and the freight paid by the shipper: *Crawford v. Mellor*, 1 Fed. Rep. 638. So, too, where a consignor improperly detains a vessel from going to sea, he is liable to the owner of the ship for his special damages: *Bixby v. Bennett*, 3 Daly, 225. A charterer is bound to do all he can to get a proper clearance for the vessel, and if by his mistake or neglect the custom-house officers delay the vessel, he will be liable for the damages: *Rumball v. Puig*, 34 Fed. Rep. 665; *Snow v. Three Hundred and Fifty Tons of Mahogany and Cedar*, 46 Fed. Rep. 129. In the absence of any stipulation in the charter-party or bill of lading as to the time within which a berth shall be provided for a ship after her arrival, it must be provided within a reasonable time, or within such time as the custom of the port provides. According to the custom of the port of New York, this time is twenty-four hours: *Henley v. Brooklyn Ice Co.*, 14 Blatchf. 522; *The Z. L. Adams*, 26 Fed. Rep. 655; *The Nether Holme*, 50 Fed. Rep. 434. When an accessible dock has been designated, it is the duty of the vessel to use reasonable means to get to it; but if a delay takes place at the request of the consignee, he takes upon himself the risks incident to change of weather, and is liable for demurrage if the discharge is not effected within the time stipulated in the bill of lading: *The Henry Sutton*, 26 Fed. Rep. 923. If, when the master reports his arrival, the consignee's wharf is inaccessible on account of ice and lack of water, and the master thereupon goes to the only accessible wharf, and notifies the consignee, the latter will be liable for the delay, if he refuses to accept the cargo: *Choate v. Meredith*, 1 Holmes, 600. But if the consignee names a suitable wharf, and directs the master how to get there, but the latter takes a different way of getting there, and in doing so grounds his vessel, causing delay, the consignee will not be liable for demurrage: *Holloway v. Lancy*, 27 Fed. Rep. 877. A master who selects an unsuitable place for unloading his vessel, the consignee having no power to select, cannot maintain a claim for demurrage: *Teilman v. Plock*, 21 Fed. Rep. 349. If a master runs the risk of there being a sufficient depth of water at a certain wharf to enable him to unload there, and it turns out that he was mistaken, and delay results, he cannot recover demurrage: *One Hundred Tons of Coal*, 14 Fed. Rep. 878; *Brudge v. Two Hundred and Twenty Tons of Fish Scrap*, 5 Hughes C. C. 141. And a ship cannot recover demurrage, where she fails to proceed promptly to a dock, which is not shown to be too crowded to permit her to unload: *Bevan v. Tredegar Co.*, 5

Hughes C. C. 401. A vessel is not ready to discharge which refuses to go to a reasonable place to deliver her cargo, and demurrage cannot be claimed for such a delay: *Ray v. One Block of Marble*, 19 Fed. Rep. 525. Nor can demurrage be allowed in a case where the detention of the vessel is due in part to the failure of the ship to supply necessary buckets and men, and in part to the failure of the consignee to furnish suitable lighters, where that was the only practicable mode of unloading: *The Scandinavia*, 49 Fed. Rep. 658. When delay is caused by the illegal acts of the master of a vessel in violating the revenue laws, he cannot recover demurrage: *Elwell v. Skiddy*, 8 Hun, 73. And if a master of a vessel sees fit to stay in port after he has discharged his cargo, in order to settle a dispute in reference to demurrage, he is not entitled to demurrage for such stay: *Sleeper v. Puig*, 10 Ben. 181.

BURDEN OF PROOF IN ABSENCE OF STIPULATION FOR DEMURRAGE. — When the contract of affreightment is silent on the subject of demurrage, the burden of proof is upon the party claiming demurrage to show some negligence on the part of the consignee or owner of the cargo, or that he exceeded some customary period, which, by implication, is a part of the contract: *The Hyperion's Cargo*, 2 Low. 93; *The Schmidt*, 27 Fed. Rep. 671; *Levech v. A Cargo of Wooden Posts*, 34 Fed. Rep. 917; *The Mary Riley v. Three Thousand Railroad Ties*, 38 Fed. Rep. 254; *Riley v. A Cargo of Iron Pipes*, 40 Fed. Rep. 605; *Bellatty v. Curtis*, 41 Fed. Rep. 479.

WAITING FOR TURN, DETENTION BY, DOES NOT ENTITLE TO DEMURRAGE. — In the absence of any provision for demurrage in the contract of affreightment, a delay in unloading a vessel, resulting from her being compelled to wait for her turn to unload, does not entitle her to claim demurrage, if the unloading is done in a reasonable time. The owner of the cargo, in such a case, is liable only for a detention caused by his own act, and not by the acts of those over whom he has no control: *Cross v. Beard*, 26 N. Y. 85; *Fisher v. Abeel*, 66 Barb. 381; *Wordin v. Bemis*, 32 Conn. 268; 85 Am. Dec. 255; *Weaver v. Walton*, 1 Flip. 441; *The Glover*, 1 Brown Adm. 166; *One Hundred and Seventy-five Tons of Coal*, 9 Ben. 400; *The M. S. Bacon v. Erie & W. T. Co.*, 3 Fed. Rep. 344; *Finney v. Grand Trunk R'y Co.*, 14 Fed. Rep. 171; *Fisk v. One Hundred and Fifty Tons of Brown Stone*, 20 Fed. Rep. 201; *Crawford v. Jessup*, 24 Fed. Rep. 303; *The Mary Riley v. Three Thousand Railroad Ties*, 38 Fed. Rep. 254; *Bellatty v. Curtis*, 41 Fed. Rep. 479; *Bartlett v. A Cargo of Lumber*, 41 Fed. Rep. 890. But under a general charter for "a cargo of coal," the charterers of a vessel cannot keep a vessel waiting for a special kind of selected coal without rendering themselves liable for the delay: *Swan v. Five Hundred and Fifty Tons of Reserve Coal*, 35 Fed. Rep. 307.

CONSIGNEE, LIABILITY OF, FOR DEMURRAGE. — When the contract of affreightment contains no provision for the payment of demurrage, the common-law courts have generally held that the consignee is not bound to pay demurrage: *Gage v. Morse*, 12 Allen, 410; 90 Am. Dec. 155; *Young v. Mosler*, 5 El. & B. 755; *Smith v. Sieveking*, 5 El. & B. 589; *Chappel v. Comfort*, 10 Com. B., N. S., 802. But when the bill of lading contains a stipulation for demurrage, either expressly or by reference to the charter-party, the acceptance of the goods is held to be evidence of an agreement by the consignee to pay demurrage: *Gage v. Morse*, 12 Allen, 410; 90 Am. Dec. 155; *Cross v. Beard*, 26 N. Y. 85; *Sutton v. Housatonic R'y Co.*, 45 Fed. Rep. 507; *Falkenburg v. Clark*, 11 R. I. 278; *Donaldson v. McDowell*, 1 Holmes, 290; *Jesson v. Solly*, 4 Taunt. 52; *Stinett v. Roberts*, 5 Dowl. & L. 460; *Wegener v. Smith*, 15 Com. B. 285; *Cawthron v. Trickett*, 15 Com. B., N. S., 754. And a bill

of lading in which the words "and all other conditions," as per charter-party, follow the expression "on paying freight," or "paying for the said goods," or similar expressions, imports a liability on the part of the consignee of goods under the bill of lading to pay the demurrage stipulated for by the terms of the charter-party to which it refers: *Porteus v. Watney*, L. R. 3 Q. B. D. 534; *Smith v. Sieveking*, 8 El. & B. 915; *Weyener v. Smith*, 15 Com. B. 285. But in the case of *County of Lancaster v. Sharp*, L. R. 24 Q. B. D. 158, where the consignees, who were agents of the shipper, informed the ship-owner before the arrival of the vessel that they would not pay the demurrage, it was held that they were not liable therefor.

COLLISION, DEMURRAGE FOR VESSEL INJURED BY. — A ship-owner whose vessel has been injured by collision is entitled to demurrage for the time during which she has been undergoing repairs: *The Steamer Baltic*, 10 Ben. 631; *New Haven S. B. Co. v. The Mayor*, 36 Fed. Rep. 716; *Williamson v. Barrett*, 13 How. 101; *The Baltimore*, 8 Wall. 377. And the rate of demurrage provided in the charter-party of the injured vessel will, in all save exceptional cases, be adhered to in determining the damages suffered by the delay while she was undergoing repairs: *The Silica v. The Lord Warden*, 30 Fed. Rep. 845. In the absence of a market value for the use of vessels, the value of such use to the owner, in the business in which she was engaged at the time of the collision, is a proper basis for estimating the damages for her detention: *The Mayflower*, 1 Brown Adm. 376. And in the case of *The Sunnyside*, 1 Brown Adm. 415, where the tug injured by the collision was at the time a member of an association, it was held that the dividends paid by the association during the time she was laid up for repairs formed a proper basis for computing the demurrage to which she was entitled.

ILLEGAL SEIZURE OF VESSEL, DEMURRAGE IN CASE OF. — Where a vessel has been illegally seized or captured, and has been restored to her owner after detention, demurrage is allowed upon the same principle as in cases of collision: *The Apollon*, 9 Wheat. 362.

MEASURE OF DAMAGES. — In estimating the amount of damages resulting from the detention of a vessel, the sum stipulated in the charter-party as demurrage is generally the measure of the damages: 5 Am. & Eng. Ency. of Law, 548; Abbott on Shipping, 13th ed., 269; *Moorsom v. Bell*, 2 Camp. 616; *Benson v. Atwood*, 13 Md. 20; 71 Am. Dec. 611; *Creighton v. Dilks*, 49 Fed. Rep. 107.

LAY-DAYS, COMMENCEMENT OF. — Lay-days are the days specified in a contract of affreightment, which the charterer of a vessel is permitted to detain her for loading or unloading without incurring liability to pay demurrage. The English doctrine in reference to the commencement of lay-days is thus stated by Brett, L. J., delivering the opinion of the court in *Nelson v. Dahl*, L. R. 12 Ch. Div. 581: "If the place named be of the larger description, as a port or dock, the notice may be given, though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but if the place named is of the more limited description, the notice cannot be given until the ship is at the named place, though the ship is in the port or dock in which the named place is situated." See also *Brown v. Johnson*, 12 Mees. & W. 331; *Nielsen v. Wait*, L. R. 16 Q. B. D. 67; *Peymann v. Dreyfus*, L. R. 24 Q. B. D. 152. The American cases hold that unless the charter-party or bill of lading manifests a contrary intention, the stipulated lay-days do not begin to run as against the consignee until the vessel has arrived at her berth, or other usual and customary place for load-

ing or unloading, and is in actual readiness to discharge her cargo in accordance with her legal obligations: *Gronstadt v. Witthoff*, 15 Fed. Rep. 285; *Manson v. New York etc. R'y Co.*, 31 Fed. Rep. 297; *Hodgdon v. New Haven & H. R. R. Co.*, 46 Conn. 276; 33 Am. Rep. 21; *Aylward v. Smith*, 2 Low. 192.

RISKS ASSUMED BY CHARTERER AFTER VESSEL REACHES PLACE OF DISCHARGE. — When a given number of days is allowed to the charterer of a vessel for unloading her, there is a contract implied on his part that from the time when the vessel reaches her usual place of discharge, he will take the risk of any ordinary vicissitudes that may occur to prevent him from releasing her at the expiration of the lay-days: *Thuis v. Byers*, L. R. 1 Q. B. D. 244; *Randall v. Lynch*, 2 Camp. 352; *Leer v. Yates*, 3 Taunt. 387; *Brown v. Johnson*, 10 Mees. & W. 331.

WORDS AND PHRASES, CONSTRUCTION OF. — The word "direct," in a charter-party, means that the vessel shall take a direct course to her port of destination, without deviation, or undue or unreasonable delay: *The Onrust*, 6 Blatchf. 533. "Dispatch" means without delay. A charterer who stipulates for dispatch in discharging takes all the risk of being able to effect such a discharge; and if he detains the vessel unduly, he must pay demurrage: *Sleeper v. Puig*, 17 Blatchf. 36. Under a charter providing for "quick dispatch" in discharging, the charterer is liable for demurrage, when the vessel, owing to the crowded condition of the port, is delayed in procuring a berth, notwithstanding the custom of the port allowing twenty-four hours after notice before commencing to receive cargo: *Davis v. Wallace*, 3 Cliff. 123; *Thacher v. Boston G. L. Co.*, 2 Low. 361; *Bjorkquist v. Certain Steel Rail Crop Ends*, 3 Fed. Rep. 717; *Mott v. Frost*, 47 Fed. Rep. 82; also, when there is a delay in giving security for the payment of the freight: *The Dixie*, 46 Fed. Rep. 403. "Customary quick dispatch" in unloading sugar requires the use of platform scales upon which the sugar can be weighed as delivered, and such scales must be furnished by the charterer, although the weighing is done by the government: *Smith v. Harrison*, 50 Fed. Rep. 565. "Running-days" are all days upon which the ship could run: *Cochran v. Ritberg*, 3 Esp. 121. Where the word "days," simply, is used, running-days are meant, unless there is some special custom to the contrary: *Brown v. Johnson*, 10 Mees. & W. 331. The words "providing for demurrage for every day, day by day," in a charter-party, are to be construed as running-days, and not working-days, and all days are to be counted, including Sundays and holidays and rainy days: *The Oluf*, 19 Fed. Rep. 459. But Sundays and holidays are not counted when the charter-party provides for "customary dispatch" in discharging: *Gates v. Ryan*, 37 Fed. Rep. 154. Nor is Sunday to be counted when the vessel could not have got out of port before Monday: *Whitehouse v. Halstead*, 90 Ill. 95. And a master of a vessel is not bound to allow cargo to be loaded at night or on Sundays, in the absence of an agreement: *Creighton v. Dilks*, 49 Fed. Rep. 107. "Working-days" do not include Sundays or holidays: *Brown v. Johnson*, 10 Mees. & W. 331; *Thuis v. Byers*, 12 Q. B. Div. 244. "Rainy days" are only those days on which the rain falls to such an extent as to interfere with the execution of the work with convenience and safety: *Balfour v. Wilkins*, 5 Saw. 429. But by usage, in the salt trade, rainy weather is deducted from the time allowed, because salt cannot be removed without damage during such weather: *Houge v. Woodruff*, 19 Fed. Rep. 136. Where a charter-party excludes from the computation of the time of loading any time lost by droughts, floods, storms, and any extraordinary occurrences beyond the control of the charterer, the ship-owner

is not entitled to demurrage for delay caused by droughts or floods in the streams or rivers which are the source of supply of the cargoes: *Paterson v. Dakin*, 31 Fed. Rep. 682; *Sorensin v. Keyser*, 48 Fed. Rep. 117. But the drought exception does not apply to previous droughts in the streams down which the cargo is floated, making a scarcity in the market, and preventing the securing of a cargo: *The India*, 49 Fed. Rep. 76. The wedging in of lighters, and the consequent delay in discharging a vessel, are results of "frost," within the meaning of an exception in a charter-party: *Aalholm v. A Cargo of Iron Ore*, 23 Fed. Rep. 620. A clause in a charter-party that "during obstruction of the navigation by ice, the lay-days are not to be counted," applies to such obstruction as prevents the loading of the vessel as well as to such as prevents her from going to sea: *Ladd v. Wilson*, 1 Cranch C. C. 293.

LIEN FOR DEMURRAGE. — The ship-owner has, in admiralty, a lien for demurrage upon the cargo, which may be enforced, even though demurrage is not expressly stipulated for in the bill of lading or charter-party. And this lien may be enforced by proceedings *in rem*: *The Hyperion's Cargo*, 2 Low. 93; *Hawgood v. One Thousand Three Hundred and Ten Tons of Coal*, 21 Fed. Rep. 681. But when no notice of any claim or lien for demurrage is made at the time of the delivery of the cargo, nor before the commencement of the suit to recover demurrage, no action *in rem* can be maintained: *Riley v. A Cargo of Iron Pipes*, 40 Fed. Rep. 605; *The Giulio*, 34 Fed. Rep. 909.

MISCELLANEOUS. — Demurrage may be recovered for the detention of a yacht by a wrongful act, at the market rate of such craft, although she was never let for hire, and no substitute was employed by her owner during the time of such detention. The amount of such demurrage may be determined by the testimony of those engaged in chartering yachts: *The Lagonda*, 44 Fed. Rep. 367. Where neither the charter-party nor the bill of lading contains any exception of strikes, the freighter will be held liable for demurrage caused by a strike, although, by the custom of the port, the ship-owner and the consignee jointly unloaded the vessel, and the men of both went on strike: *Budgett v. Binnington*, L. R. 1 Q. B. (1891). If a charterer of a vessel has no agent at the port of destination to whom the master can give notice on his arrival, the charterer will be liable for demurrage from the time of her actual readiness to discharge the cargo: *Hatton v. De Belunwaran*, 26 Fed. Rep. 780. If a vessel, being unable to complete her lading in port owing to lack of water, goes outside to complete her cargo, and the charterer refuses to load her there, he will be liable for demurrage: *Belmont v. Tyson*, 3 Blatchf. 530. Where a charterer stipulates in the bill of lading for a certain depth of water at a berth, the owner is entitled to demurrage for the delay resulting from a lack of that depth of water: *Sutton v. Housatonic R'y Co.*, 45 Fed. Rep. 507. The arrest and detention of a vessel by legal process in a suit *in rem*, which, although unfounded, is not *mala fides*, does not entitle the owner to demurrage: *Portland Shipping Co. v. The Alex. Gibson*, 44 Fed. Rep. 371. A claim for demurrage against a cargo will be allowed for delay caused by the issuance of attachments against it: *The Malta*, 34 Fed. Rep. 144. A delay caused by the failure of the charterer of a vessel and her master to agree in the selection of a stevedore, where the contract calls for the employment of a stevedore satisfactory to both, does not give a right to claim demurrage: *Portland Shipping Co. v. The Alex. Gibson*, 44 Fed. Rep. 371.

SOUTHARD v. CURLEY.

[134 NEW YORK, 143.]

REFORMATION OF CONTRACT, DEGREE OF PROOF NECESSARY IN ACTION FOR.

—In an action to reform a written contract on the ground that, owing to a mistake, it fails to express the agreement which the parties to it actually made, it is incumbent upon the party alleging the mistake to clearly establish it by satisfactory proofs, but he is not bound to establish the mistake beyond a reasonable doubt. It is not, therefore, error, in an action upon a contract, in which the answer sets up a mistake, and asks for a reformation thereof, for the court to refuse to charge the jury “that the burden of proof is on the defendant to satisfy the jury, beyond a reasonable doubt, that there was a mutual mistake in this case.”

Horace Secor, Jr., for the appellant.

Charles N. Morgan, for respondent Curley.

Kohn and Ruck, for respondent Brosnan.

PARKER, J. This action was instituted for the purpose of recovering the damages which the plaintiff claims to have sustained by reason of a breach, by the defendants, of the following agreement:—

“September 10, 1889.

“I, C. H. Southard, of Baldwins, Queens County, New York, agree to sell to John J. Curley and J. M. Brosnan, of Rockaway Beach, Long Island, said county and state, all [here follows a description of the property in question], for the sum of thirty-one thousand dollars, to be paid at thirty or sixty days from date of this agreement; and I hereby acknowledge the receipt of check of one hundred dollars from John J. Curley and J. M. Brosnan, both of Rockaway Beach, New York.

C. H. SOUTHARD.

“Signed and delivered in the presence of—

“J. M. BROSNAN and

“JOHN CURLEY.”

The property described in the agreement was a portion of the Mammoth Hotel, at Rockaway Beach.

The answer averred the purchase of the building, by the plaintiff, of the owners of the land on which the building was located; the securing of an option by the defendants to purchase the premises from the owners within a given period; their desire to secure an option for the purchase of so much of the hotel buildings as remained standing; and that the agreement which they in fact made with the plaintiff was to pay him one hundred dollars for an option to purchase the build-

ing within thirty or sixty days for the sum of thirty-one thousand dollars, but the defendant Brosnan, in the haste of drafting the memorandum of agreement, omitted to insert that the sale was optional with the defendants.

The answer demanded, among other relief, that the writing be so reformed as to express the true meaning of the parties.

No exceptions were taken to the admission of testimony.

But an exception was taken to the refusal of the court to direct a verdict in favor of the plaintiff, at the close of the case, and the appellant urges that an error is thus presented.

We do not so regard it. The issue presented by the pleadings permitted the introduction of testimony tending to show that the writing relied on by the plaintiff did not state the agreement which the parties made.

On the trial, evidence tending to establish the allegations of the answer in such respect was, without objection, introduced, and without stopping to recite it, it is sufficient to say that it would support a decree so reforming the writing as to provide that the one hundred dollars was paid for the right to purchase the property described within the period provided, and for the sum named.

The denial of plaintiff's motion to direct a verdict, therefore, was not error.

No exception was taken to the charge of the court, but the plaintiff requested the court to charge "that the burden of proof is on the defendants to satisfy the jury, beyond a reasonable doubt, that there was a mutual mistake in the case," and the exception taken to the refusal of the court to charge as requested is now assigned for error.

It is a rule of the criminal law that the guilt of the accused must be fully proved; that neither a preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt.

A degree of conviction, it is said, which ought only to be produced when the facts proved coincide with and are legally sufficient to establish the truth of the hypothesis assumed, namely, the guilt of the party accused, and are inconsistent with any other hypothesis.

But a distinction has always been recognized and maintained between criminal and civil cases in respect to the degree or quantity of evidence necessary to support a judgment; in the latter class of actions the law being satisfied with a

finding in accordance with the preponderance of or weight of preponderating evidence.

The difference in the form of oath administered to jurors in civil cases and criminal actions is in accordance with this fundamental distinction.

But it is urged that in an action brought to reform a written contract, on the ground that, owing to a mistake, it fails to express the agreement which the parties to it actually made, the courts have at last adopted the rule of criminal actions, that the evidence must be such as to establish the mistake beyond a reasonable doubt. That such was not always the rule is conceded, but it is claimed that the later adjudications have settled the rule in accordance with the appellant's contention.

In Story's Eq. Jur., sec. 157, the doctrine is stated as follows: "Relief will be granted in cases of written instruments only when there is a plain mistake, clearly made out by satisfactory proofs. It is true that this, in one sense, leaves the rule somewhat loose, as every court is still left free to say what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity incident to the very administration of justice; for in many cases judges will differ as to the result and weight of evidence, and consequently they may make different decisions upon the same evidence. But the qualification is most material, since it cannot fail to operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions."

The rule declared by Story was in accordance with the adjudications at the time of his writing, and in accordance, doubtless, with the general understanding of the profession at the present time.

Judge Redfield, in his revision, has added to section 157 (Story's Eq. Jur., 11th ed.), the following: "The proof must be such as will strike all minds alike as being unquestionable and free from reasonable doubt. The distinction here attempted to be defined, in regard to the measure of proof, is much the same which exists between civil and criminal cases."

Mr. Pomeroy, in his work on equity jurisprudence (vol. 2, sec. 859), reaches the same conclusion. He says: "The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and con-

vincing,—in the language of some judges, the strongest possible,—or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt.”

We have examined all of the authorities cited by Judge Redfield and Mr. Pomeroy in support of the rule which they have attempted to deduce from them, as well as those cited by the appellant.

It would hardly be proper, in this connection, to attempt a review of them all, but we have selected from different jurisdictions a number of cases which are fairly representative, as to the expressions made use of by the courts touching the degree or quantity of proof essential to support a decree reforming a written instrument on the ground of mistake.

It should be observed, in passing, however, that in none of the cases was the court called upon to determine whether the trial court observed the proper rule in passing on the evidence, or whether, as here, it had correctly or not instructed the jury in that regard. What rule should guide the trial court was not, therefore, necessarily discussed by counsel; and we have failed to find any evidence of a discussion by any of them of the question whether the rule in criminal actions touching the degree and quantity of proof necessary to support a judgment of conviction is applicable to cases of this character.

It should also be remarked that the expressions in the several opinions relied on as establishing the rule contended for were generally, if not universally, made in connection with such a discussion of the evidence as induced an affirmance or reversal of the judgments under review.

Lord Hardwicke, in *Henikle v. Royal Exchange Assur. Co.*, 1 Ves. Sr. 317, said: “There ought to be the strongest proof possible.”

In *United States v. Munroe*, 5 Mason, 572, the court said: “The evidence must be clear, unequivocal, and decisive, not evidence which hangs equal or nearly *equilibrio*.”

In *Andrews v. Essex Fire etc. Ins. Co.*, 3 Mason, 6, by Story, J.: “But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought, therefore, in all cases, to withhold its aid where the mistake is not made out by the clearest evidence according to

the understanding of both parties, and upon testimony entirely exact and satisfactory."

In *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, Chancellor Kent remarks: "Does it satisfy the mind of the court?"

Fry on Specific Performance, 2d Am. ed.: "The proof must be clear, irrefragable, and the strongest possible."

Bold v. Hutchinson, 5 De Gex, M. & G. 558: "If it is perfectly palpable that there has been a mistake, the court will correct it. The question before me is, whether I am satisfied that a settlement has been made in error."

Coale v. Merryman, 35 Md. 382: "The evidence must be such as to satisfy the mind of the court."

Lyman v. Little, 15 Vt. 576: "Equity will not correct a mistake in a written instrument, except on clear and undoubted testimony."

Miner v. Hess, 47 Ill. 170: "It must leave little, if any, doubt."

Stockbridge Iron Co. v. Hudson Iron Co., 102 Mass. 45: "The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt." In laying down this rule, the court did not refer to other adjudications.

Sawyer v. Hovey, 3 Allen, 331; 81 Am. Dec. 659: "The mistake must be made out, according to the understanding of both parties, by proof that is entirely exact and satisfactory."

White v. Williams, 48 Barb. 222: "The relief will not be granted, except when the mistake is very plain, and operates contrary to the intention of the parties."

Tufts v. Larned, 27 Iowa, 330: "The evidence of mistake must be such as will strike all minds alike as being unquestionable and free from reasonable doubt."

Nevius v. Dunlap, 33 N. Y. 676: "To entitle a party to the decree of a court of equity reforming a written instrument, he must show, first, a plain mistake, clearly made out by satisfactory proofs."

Mead v. Westchester F. Ins. Co., 64 N. Y. 453: "The proof upon this point should be so clear and convincing as to leave no room for doubt."

Ford v. Joyce, 78 N. Y. 618: "The mistake should be proved as much to the satisfaction of the court as if admitted."

Newton v. Holley, 6 Wis. (*592) 564-578: "The mistake

must be made out in a most clear and decisive manner, and to the entire satisfaction of the court."

Linn v. Barkey, 7 Ind. 69: The mistake "must be established beyond a reasonable controversy."

Hill v. Hill, 10 Week. Dig. 239: "The proof of the mistake should be clear and positive; it should not leave a reasonable doubt."

Boardman v. Davidson, 7 Abb. Pr., N. S., 439: The mistake "must be shown by clear and entirely satisfactory proof, and the relief will not be granted when the evidence is loose, equivocal, or contradictory, or is in its texture open to doubt or to opposing presumption."

In *Devereux v. Sun Fire Office*, 51 Hun, 147: The evidence of mistake "should be clear and convincing, and such as to leave no reasonable doubt as to the existence of the mistake alleged."

Little v. Webster, 1 N. Y. Supp. 315: "The evidence should be strong and conclusive, and in some cases it has been held should be beyond all reasonable doubt. But perhaps this expression is too strong. There must be at least very conclusive evidence that by mistake the contract does not represent the intention of the parties."

Simmons Creek Coal Co. v. Doran, 142 U. S. 417-435: "But, to justify such reformation, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court."

The quotations made indicate a universal agreement that a contract shall not be reformed on loose, contradictory, and unsatisfactory evidence; a settled determination that when a mistake is alleged, it must be clearly established by satisfactory proofs, or the contract will stand as made. But in giving expression to the necessity of observing such caution, some judges have employed conservative language, others extreme, — a difference doubtless due to the fact that the question before the court for discussion in the different cases was, not what is the abstract rule as to the degree or quality of the evidence required, but rather, whether the particular evidence under consideration justifies a reformation. While, in a few instances, apparently unconsidered expressions may be found to the effect that the mistake must be established beyond a reasonable doubt, so may a variety of other expressions, differing in form, but equally well supported, be found, such as: "It must be proved as much to the satisfaction of the court as if admitted"; "the proof must be clear, irrefragable, and the strongest pos-

sible"; or "there must be a plain mistake, established by satisfactory proofs,"—a situation which suggests that we heed the caution of Folger, J., in *Taylor v. Mayor etc.*, 82 N. Y. 17: "It is not always well to take particular phrases and sentences from an opinion, and read them as giving the core of the judgment." The same thought was expressed in *Hastings Nat. Bank v. Hibbard*, 48 Mich. 457: "It must always be remembered that general language in legal discussions is to be construed with its surroundings, and cannot be dealt with in the abstract."

Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264, not only called attention to the care which should be observed in asserting that general expressions used in an opinion must be accepted as law, but most admirably stated the reason for it. He said: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Bearing in mind these admonitions as we examine the opinions alluded to, we reach the conclusion that they do not require us to declare that this strong rule of criminal procedure has become a part of the practice in civil actions. Certainly this need not be done, in view of the many authorities which, both before and since Judge Story penned the rule that "relief will be granted in cases of written instruments only when there is a plain mistake clearly made out by satisfactory proofs," have asserted the same doctrine in terms or in substance.

We think the refusal to charge as requested was not error. The judgment should be affirmed.

MISTAKE, EVIDENCE TO PROVE. — In addition to the cases cited by the court, the following may be given: To show mistake in a bond, the evidence must be full and satisfactory: *Smith v. Allen*, 1 N. J. Eq. 43; 21 Am. Dec. 33. Evidence to justify relief on the ground of mistake must be clear, unequivocal.

cal, and decisive as to the mistake: *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63. To reform a written instrument on the ground of mistake, the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court; but relief will not be denied because the testimony is conflicting: *Hutchinson v. Ainsworth*, 73 Cal. 452; 2 Am. St. Rep. 823. To establish mistake, the party alleging it must prove it clearly and satisfactorily, and perhaps beyond a reasonable doubt; and to charge that to establish mistake, the evidence in its favor must be more weighty, convincing, or satisfactory than the evidence of the other party, is not error, as a mere preponderance of evidence is not sufficient: *Parker v. Hull*, 71 Wis. 368; 5 Am. St. Rep. 224. The mistake must be made to appear "clearly and satisfactorily, by clear, full, and definite testimony, to the satisfaction of the jury": *Claybaugh v. Goodchild*, 135 Pa. St. 421. The mistake must be "established by clear, precise, and indubitable evidence": *Jenkins v. Davis*, 141 Pa. St. 266. The proof of a mistake ought to be "clear and satisfactory": *Powell v. Heisler*, 16 Or. 412. The evidence should be "clear and strong, satisfactory and conclusive": *Linscott v. Linscott*, 83 Me. 384. The proof of mistake should be "clear and convincing": *Giles v. Hunter*, 103 N. C. 194.

BENNER v. ATLANTIC DREDGING COMPANY.

[134 NEW YORK, 156.]

FAILURE OF PROOF DUE TO ACT OF COURT NOT AVAILABLE ON APPEAL WHEN.

— When a defendant, while giving evidence to show that he performed the acts complained of under the authority of the United States government, is interrupted by the trial court with the statement that further proof is unnecessary, and thereupon desists from presenting further evidence on that point, the question as to such authority cannot be raised by the plaintiff on appeal.

POWER TO IMPROVE NAVIGABLE WATERS VESTED IN UNITED STATES. —

The power to improve rivers and arms of the sea, forming the highways of commerce, is vested in the government of the United States, and if Congress provides for the exercise of such power in a manner complete, according to that government's judicial test, it must be regarded as equally complete in every state in which such power is exercised.

CONTRACTOR DOING PUBLIC WORK UNDER AUTHORITY OF UNITED STATES NOT LIABLE FOR INJURY TO INDIVIDUAL WHEN. —

Where a contractor does public work in a proper and careful manner, under a contract with the government of the United States, which that government has authority to make, he is not liable for any injury, direct or consequential, to private property that may result therefrom. Where, therefore, a contractor, while blasting rocks in a navigable river, for the purpose of removing obstructions to navigation, under a contract with the United States government, injures a house, distant three thousand feet from the place of the explosion, the injury not being caused by casting any materials upon the premises, but simply by the vibrations of the earth or by the pulsations of the air, he is not liable for the injury in an action brought against him by the owner of the house, without proof of negligence; and a charge to the jury that if the explosions injured the house, he is liable, without regard to the question of negligence, is error.

ACTION to recover damages caused to the plaintiff's house by blasting done by the defendant in the waters of Hell Gate. The defendant pleaded that the blasting was done under the authority of the United States, and under the direction of the officer of the engineer corps of the United States army in charge of the work; that the operations were a public necessity and requirement, and were duly performed in a lawful and careful manner, and without any default, negligence, or carelessness on its part. The blasting was done under a contract between Lieutenant-Colonel Walter McFarland, corps of engineers, United States army, for and in behalf of the United States of America, and the defendant, approved by H. Droom, brigadier-general, chief of engineers. The subject of the contract was the removal of fifty thousand tons of broken rock from Hell Gate, subject to inspection by an inspector appointed on the part of the government. The specifications provided that the contractor should do such surface blasting as might be necessary, at his own expense. Other facts are stated in the opinion.

N. C. Moak, for the appellant.

Edward C. Perkins, for the respondent.

LANDON, J. The plaintiff contends that the defendant did not prove that it was authorized by the United States to blast the rocks in Hell Gate.

The defendant had read in evidence, without objection, the contract under which it prosecuted the work of removing fifty thousand tons of broken rock from Hell Gate. This contract was made by Lieutenant-Colonel Walter McFarland, corps of engineers, United States army, as party of the first part, and recited that he made it "for and in behalf of the United States of America, . . . subject to the approval of the chief of engineers, United States army," and was approved by that officer. The plaintiff also read a stipulation of the defendant's attorney that plaintiff might read in evidence the whole or part of the records of the war department concerning the contract by the defendant to do the work in the Hell Gate improvement, and the work done by the defendant under the contract. The plaintiff did prove by Lieutenant Derby, an officer in the United States government employ, that he was superintendent of the improvement, and as such kept a record of the progress of the work. Plaintiff read from this record,

under the stipulation, matters relating to the explosions. Plaintiff also read in evidence a letter of Lieutenant Derby to the defendant respecting the explosions. The plaintiff thus attempted to convict the defendant of improperly conducting the explosions, by the records of the war department. The effort does not appear to have been successful. While the defendant had possession of the case, its counsel was proceeding to give further evidence of the fact that its contract was with the United States, when the trial court interrupted him, and a colloquy ensued between the court and defendant's counsel, in which the court said: "There is nobody who says it [the contract] was not authorized. . . . These plaintiffs cannot question your right to be there, because you proved the contract which took you there. . . . Colonel McFarland was in the habit of making contracts for the government. I presume the government recognized the contracts and paid under them." Defendant's counsel thereupon desisted from presenting further evidence respecting the proper authorization by the United States. There is no suggestion in the record that the plaintiff did not acquiesce in the views presented by the court. The court, in charging the jury, after stating that large masses of broken rock were left in the bottom of East River as the result of a great explosion conducted by the United States government in 1885, and that the rocks were dangerous to navigation, added: "The Atlantic Dredging Company entered into a contract with the general government for the destruction and removal of these fragments. . . . Under that contract they went upon the East River and commenced the destruction of these fragments, which were scattered about the bottom of the river. The defendants were thus justified in going there."

Upon these facts this court cannot entertain the suggestion that the defendant must fail because it did not show that in removing these masses of rock it was acting under the authority of the United States. Evidence had already been given, tending to prove that it acted under such authority. The stipulation and evidence adduced by the plaintiff implied that the fact was so. The defendant was giving further evidence to the same end, and practically was not allowed to give any more; the question was put to rest by the statement of the court to the effect that further proof was unnecessary. The defendant had the right to rely upon the direction given by the court: *Flora v. Carbean*, 38 N. Y. 111. True, the rec-

ord does not present the plaintiff's exceptions. Why not? Because no exception taken by the plaintiff can aid him. He must defend his judgment against the attack of the defendant. The defendant can say, My authority from the United States was conceded, but I was beaten because the court held that that could not aid me. The plaintiff is not harmed; for if a new trial should be granted, the plaintiff can contest the question of authority. If a new trial should be refused because the authority was not sufficiently shown, the defendant will be beaten because denied a day in court upon the question of authority.

That the defendant's contract was with the United States cannot be questioned upon this appeal. But it is said the authority of the United States to make the contract must be shown. We know that Congress has exclusive power to regulate commerce, both foreign and interstate, and that the improvement of rivers and arms of the sea forming the highways of such commerce is vested in the United States: *Wisconsin v. Duluth*, 96 U. S. 379. Various acts of Congress — of which we take judicial notice, since they are the supreme law of the land — appropriated moneys for the improvement of Hell Gate, and authorized it: 22 U. S. Stats. 58, 191; 23 U. S. Stats. 133, 138; 24 U. S. Stats. 310, 318. Other statutes bear upon the subject. The United States is a sovereign nation, with full power over the subject-matter, and may by statute provide for the exercise of that power in such legislative meagerness of form as suits itself. If its attempted exercise of power is complete according to its own judicial test, it is complete under ours. The case last cited is an exposition of the power of the United States under similar statutes, and we repose upon its authority.

It must be held that the United States was competently authorized to make the contract, and in making it kept within its powers both as to the subject-matter of the contract and the manner in which it engaged and authorized the defendant to perform it.

The learned trial court charged the jury that if the explosions conducted by the defendant injured the plaintiff's house, the defendant was liable, irrespective of the question of defendant's negligence; that the question of negligence was not in the case; that if the business could not be conducted without producing such injury, it must cease. We think this was erroneous. It is entirely clear that the defendant had all the

authority of the United States to use all the means contemplated by the contract for the removal of these rocks, provided always that he used them carefully; care being a proper regard both to the efficient prosecution of the work and the rights of third persons; the absence of such care being negligence.

The instruction of the trial judge eliminates negligence and assumes proper care. Thus the defendant had the authority of the United States to do the work carefully, and did it within such authority.

It being lawful for the sovereign to exercise its lawful power, it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy.

The government has provided for such direct injuries as amount to a taking of private property for public use, by the constitutional provision that it must not be done without full compensation. If the present were such a case, it would seem that the plaintiff's remedy would be to make the proper application to the government. The defendant, having done no more than it was fully authorized to do, and which its duty to the government under the contract required it to do, would be blameless, and the government liable because of its constitutional obligation.

But this is not a case of taking private property, or of direct, but is of consequential, injury. The plaintiff's house was three thousand feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosion. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substances upon them, as in *Hay v. Cohoes Co.*, 2 N. Y. 159; 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163; 51 Am. Dec. 284; *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258; and hence no going outside of the authority actually conferred and conferrable as in those cases. Nor was the work here prosecuted for the benefit of private ownership aided by the public grant of the privilege, as in *Cogswell v. New York etc. R. R. Co.*, 103 N. Y. 10; 57 Am. Rep. 701; and hence the rules applicable to public grants of privileges to private parties or corporations have no force. This work was done under the government, for the government, and in no sense to the detriment of public rights, or to the advantage

of the defendant's private ownership. The principles assumed in the case last cited amply support the defendant's position.

One cannot confine the vibration of the earth or air within inclosed limits, and hence it must follow that if in any given case they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless.

The defendant had the authority of the government, and kept within it, and therefore is not liable: *Radcliff v. Mayor etc.*, 4 N. Y. 195; 53 Am. Dec. 857; *Bellinger v. New York Cent. R. R. Co.*, 23 N. Y. 42; *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Uline v. New York etc. R. R. Co.*, 101 N. Y. 98; 54 Am. Rep. 661; *Atwater v. Village of Canandaigua*, 124 N. Y. 602; *Transportation Co. v. Chicago*, 99 U. S. 635; Wood on Nuisances, sec. 752; quoted with approval in *Seifert v. City of Brooklyn*, 101 N. Y. 145; 54 Am. Rep. 664.

Criticism with respect to the extent to which private and municipal corporations have been permitted to expand the authority given them by the government to justify their invasion of private rights (*Cogswell v. New York etc. R. R. Co.*, 103 N. Y. 10; 57 Am. Rep. 701) may be pertinent when such parties attempt the expansion for such purposes, but it can have no pertinency to a case where the government itself seeks, by appropriate means plainly adapted to the end, to accomplish for the public benefit any of the objects confided to its jurisdiction: *McCulloch v. Maryland*, 4 Wheat. 316-421.

The judgment should be reversed, and a new trial granted, costs to abide the event.

LIABILITY FOR CONSEQUENTIAL DAMAGES CAUSED BY THE IMPROVEMENT OF NAVIGABLE WATERS. — The principle that individuals have no cause of action for damages occasioned by the exercise of the powers of the state to improve navigation, and to do all acts essential thereto, has frequently been recognized by the courts. Thus riparian proprietors cannot recover damages for the closing, bridging, or obstructing of a navigable river, when done by the authority of the state, though benefits and advantages enjoyed by them are thereby cut off: *Bailey v. Philadelphia etc. R. R. Co.*, 4 Harr. (Del.) 389; 44 Am. Dec. 593. Nor is the riparian owner entitled to damages for a diversion of the water by the authority of the state for the improvement of navigation: *Black River Imp. Co. v. La Crosse Booming etc. Co.*, 54 Wis. 659; 41 Am. Rep. 66, citing numerous cases to the same effect. Nor is a corporation which has erected a dam across navigable waters, under authority of an act of the legislature, liable to a riparian owner below for damages occasioned by altering the flux and reflux of the tide: *Parker v. Cutler Milldam Co.*, 20 Me. 353; 37 Am. Dec. 56. The powers of the state are limited by the principle that the acts done for the purposes of improving navigation must not

be inconsistent with the constitutional rights recognized by the law of eminent domain. But those rights are not infringed where the lands of individual proprietors are washed away by reason of the acts of a corporation empowered to improve the navigation of a river: *Hollister v. Union Co.*, 9 Conn. 436; 25 Am. Dec. 36.

HECKEMANN v. YOUNG.

[184 NEW YORK, 170.]

JUDGMENT AGAINST ONE OF SEVERAL JOINT DEBTORS, WHEN NOT BAR TO ACTION AGAINST THE OTHERS. — The common-law rule that a judgment against one of several joint debtors is a bar to an action against the others rests upon the idea of an election by the creditor to take such a judgment, in which case the extinguishment of his cause of action by the recovery of the judgment is presumed to have been intended by him; but this rule has no application to a case in which, without the consent and in spite of the opposition of the creditor, a judgment against all the joint debtors is vacated by the court as to one of them, who is let in to contest his liability. In such a case, the debtor let in to answer cannot set up the judgment against the other debtors as a bar, and it is error to dismiss the complaint on the ground that the debt has been merged in the judgment.

ACTION to recover from the defendants, George W. Adams and David B. Young, formerly composing the firm of Adams and Young, the sum of \$5,892.28, with interest, for money previously advanced for freight on goods. On the 20th of January, 1887, both defendants, who had appeared generally by separate attorneys, being in default, judgment by default was rendered against both defendants for the sum of \$6,165.25. On the 2d of May following, Young moved to vacate the judgment as to himself. The motion was granted, against the plaintiff's objection, and twenty days were given to Young within which to serve an amended answer. The answer filed in pursuance of this leave set up the judgment against Adams as a bar, and alleged that the debt became merged in that judgment. No leave was given to Young to set up this new matter by way of supplemental answer, nor did the plaintiff move to strike it out. On the trial, the plaintiff introduced evidence establishing the cause of action alleged in the complaint, and rested. The court thereupon dismissed the complaint, on the sole ground that the debt which the action was brought to recover had become merged in the judgment then standing against Adams, which judgment constituted a bar to any further proceedings against Young. Other facts are stated in the opinion.

Gilbert R. Hawes, for the appellant.

A. Edward Woodruff, for the respondent.

PARKER, J. It is the rule of the common law, recognized and enforced by the courts of this state, except as modified by section 1278 of the Code of Civil Procedure, that a judgment rendered against one of several joint debtors in an action against him alone is a bar to an action against the others: *Candee v. Smith*, 93 N. Y. 849; *Suydam v. Barber*, 18 N. Y. 468; 75 Am. Dec. 254.

Section 1278 of the Code of Civil Procedure provides that in case of a confession of judgment by one or more joint debtors, judgment may be entered and enforced against them, "and it is not a bar to an action against all the joint debtors upon the same demand." That section is not in terms applicable to the situation before us, but it is instructive as indicating a legislative intent to limit in some measure the common-law rule. This court had before it, in *Harbeck v. Pupin*, 123 N. Y. 115, a case which was held to be governed by that section. It was objected that the action was not within its provisions, because not brought against "all the joint debtors," but against the personal representatives of one of the joint debtors; also, that it was not "upon the same demand, but upon a demand reduced by payments made in pursuance of a compromise with two of the joint debtors after confession of judgment." It was said that "to adopt a construction so narrow and literal as this would be to practically nullify a remedial statute, intended by the legislature to abrogate a harsh and technical rule of the common law that frequently operated to defeat a just claim." Except as modified by the statutory provisions to which we have referred, the common-law rule obtaining at the time of its enactment continues in force. But such enactment should be regarded as a caution against any extension of the rule beyond the lines already firmly established by authority.

In *Suydam v. Barber*, 18 N. Y. 470, 75 Am. Dec. 254, the court, in assigning a reason for the rule that a judgment against one of several joint debtors obtained in an action against him alone is a bar to an action against the others, said: "It is held to be a bar upon the ground that by the recovery of the judgment the promise or cause of action as to the party sued has been merged and extinguished in the judgment by operation of law, at the instance and by the act of the creditor."

Having but one debt, although two or more persons may be jointly liable for it, the creditor has but one cause of action, which he is not permitted to split up into as many different actions as there are joint debtors. Having but one cause of action, if he prosecute that to judgment against less than the whole number of joint debtors, he is deemed to have intended to waive his right to proceed against the others. The idea of election by the creditor is necessarily involved. Being presumed to know the law, the extinguishment of his cause of action by the recovery of a judgment against only a part of his joint debtors is presumed to be intended by him, because the result of his own act.

Now, this plaintiff did not elect to proceed to judgment against Adams alone. Adams and Young were parties defendant, and a joint judgment was rendered against them. And the recitals in the judgment indicate that the plaintiff was at the time of its entry entitled to judgment against both defendants. Subsequently, it is true, the judgment was vacated as to the defendant Young, and he let in to answer. But this was not on plaintiff's motion. On the contrary, he opposed it. He insisted on the right to retain his judgment against both defendants, and the determination of the court to open the judgment as to one of the defendants, and let him in to contest his liability, cannot be deemed an election by the plaintiff to extinguish the cause of action which the court, by its order, said the defaulting defendant might litigate.

The record does not contain the motion papers, and we are therefore in the dark as to the ground upon which the special term based its decision vacating the judgment as to Young, and letting him in to contest the cause of action alleged in the complaint. So far as this record discloses, he had no defense at the time when the motion was made. Certainly, the court did not intend that the order granted should create a defense where none existed, nor can such an effect be given to it.

The judgment should be reversed.

JUDGMENT AGAINST ONE OF SEVERAL JOINT DEBTORS is a bar to an action against the others: *Ferrall v. Bradford*, 2 Fla. 508; 50 Am. Dec. 293. *Contra, Collins v. Lemasters*, 1 Bail. 348; 21 Am. Dec. 469. A judgment unsatisfied against one of three joint obligors is not a bar to an action against the other two, where, in the prior case, the judgment was obtained only against the one obligor, and the action dismissed as to the others, by the fraudulent representations of one of the joint obligors: *Ferrall v. Bradford*, 2 Fla. 508; 50 Am. Dec. 293. Taking out execution on one of several sep-

arate judgments recovered against several joint trespassers is an election by the plaintiff to enforce that judgment; and though he fails to obtain satisfaction, he cannot sustain an action upon any of the other judgments: *Beardman v. Acer*, 13 Mich. 77; 87 Am. Dec. 736.

RICE v. ROCKEFELLER.

[184 NEW YORK, 174.]

TRUST CERTIFICATE, ASSIGNEE OF, MAY COMPEL TRANSFER THEREOF ON BOOKS OF TRUSTEES. — Where the stockholders of certain corporations and partnerships and certain individuals engaged in a certain enterprise create a trust whose object is to authorize the trustees to control and manage the business, trust certificates transferable on the books of the trustees, upon surrender of the certificates, are by the trustees issued to the parties to the agreement, and to their assignees, who are, by the terms of the agreement, the beneficiaries under the trust, the holder of such certificates being by their terms subject to all the terms of the agreement, and of the by-laws adopted in pursuance thereof, as fully as if he had signed the same, such certificates have on the back a blank form of transfer, by the terms of which the transferee is appointed attorney, with authority to make the necessary transfer upon the books of the trust, and such certificates are for sale in the open market, a person who purchases one of those certificates in the open market, taking from the person to whom it has been issued an assignment thereof in a duly formal manner, and demands that a transfer be made to him on the books, and a new certificate issued to him, offering, upon compliance with his demand, to surrender the old certificate, may maintain an action to compel such transfer and the issuance to him of a new certificate. The quality of transferability given to the certificate imports the right to make it effectual by transfer on the books.

REFUSAL TO TRANSFER TRUST CERTIFICATE TO ASSIGNEE THEREOF NOT JUSTIFIED BY HIS HOSTILITY TO TRUST. — In an action by an assignee of a certificate of a trust to compel the trustees to transfer it to him on the books of the trust, where the answer alleges and the trial court finds that the plaintiff was a competitor and rival of the parties to the trust agreement, and had been engaged in transactions and proceedings hostile to the trust and to them, this will not justify the refusal to make the transfer; and where it is not shown that the relief sought will be unjust or prejudicial to the legal rights of the defendants, the plaintiff's motive in seeking it is not legitimately a subject of consideration.

CORPORATION CANNOT DISCRIMINATE BETWEEN BONA FIDE PURCHASERS OF ITS STOCK. — In the absence of any discretionary power expressly reserved, a corporation or company whose stock is for sale in the open market has no right to so discriminate between *bona fide* purchasers thereof as to deny to some of them the right to make their title effectual for recognition by the company in the manner provided by it for that purpose, while allowing it to others. The right to perfect the transfer is, in such case, an apparent right incident to the purchase.

ACTION to compel the defendants to transfer to the plaintiff upon their books six shares of stock in the Standard Oil Trust, upon the surrender of the certificates of such shares held by him. The Standard Oil Trust was created by written agreement between the stockholders and members of certain corporations and limited partnerships and certain individuals therein named, or that might thereafter join in it at the request of the trustees. The trustees, pursuant to the trust, received from the parties to the agreement certain bonds and stocks in trust, and issued to them therefor Standard Oil Trust certificates transferable on the books of the trust, these parties and their transferees becoming the beneficiaries under the trust. These certificates had a regular market value, and were dealt in in the open market, and were held in considerable amounts by persons who were transferees thereof, and not parties to the above-mentioned agreement. One of the objects of the agreement was to secure to the trustees the general supervision of the affairs of the parties thereto. The above-mentioned facts were alleged in the complaint and admitted by the answer. It was proved and found by the court that plaintiff purchased in the open market five shares of stock duly issued to one L. B. Mallaby by the trustees, and paid for it \$190 per share, and the certificate was thereupon transferred to him by said Mallaby. The following is a copy of the certificate, and of the transfer indorsed on it: —

“Shares \$100 each.

“STANDARD OIL TRUST.

“Number 1936.

Shares 5.

“This is to certify that L. B. Mallaby is entitled to five shares in the equity to the property held by the trustees of the Standard Oil Trust, transferable only on the books of said trustees on surrender of this certificate. This certificate is issued upon condition that the holder or any transferee thereof shall be subject to all the provisions of the agreement creating said trust and the by-laws adopted in pursuance of said agreement as fully as if he had signed the said trust agreement.

“Witness the hands of the president, secretary, and treasurer of the board of trustees this twenty-fifth day of August, A. D. 1885, at the city of New York.

“WM. ROCKEFELLER, V. President.

“J. F. FREEMAN, A. Treasurer.

“H. M. FLAGLER, Secretary.”

"For value received, I hereby sell and transfer to George Rice, of Marietta, Ohio, five shares of the Standard Oil Trust, standing in my name on the books of said trust. And I hereby irrevocably appoint said George Rice my attorney to make the necessary transfer upon the books of said trust, in accordance with the regulations thereof, and upon the conditions expressed on the face of this certificate.

"Dated August 26, 1885.

L. B. MALLABY.

"In presence of C. F. STREIGHTOFF."

Subsequent to the purchase by plaintiff, the trustees declared a stock dividend of one share for every five shares outstanding, and a certificate for one share of stock was thereupon issued to Mallaby, who thereafter transferred it to the plaintiff. Subsequently the plaintiff made a formal written demand for the transfer of the six shares to him, upon surrender of the certificates. This demand was refused. Other facts appear from the opinion.

Edward T. Bartlett, for the appellant.

Joseph H. Choate and William V. Rowe, for the respondents.

BRADLEY, J. The defense is founded upon the propositions, — 1. That the plaintiff failed to prove that he was a beneficiary under the Standard Oil Trust agreement, or entitled to become such by means of transfer, upon the books, of the shares represented by the certificates held by him; and 2. That he is not seeking such relation in good faith, but for purposes hostile to the trust, and for that reason is not entitled to the aid of the equitable powers of the court in that behalf.

The Standard Oil Trust represents a voluntary association. It was created by agreement of the stockholders of various corporations and others engaged or interested in a certain enterprise, and the several branches of business connected with and incidental to it. The effect of its creation is the concentration of supervisory power in nine trustees, whose certificates of the trust are taken in place of the stock and bonds of the several corporations. The characteristic feature of it is in the voluntary surrender of the control and management of the business of those corporations, and in the fact that for its continuance, it has the capacity of succession. The agreement constituted, not a partnership, but a trust in behalf of the beneficiaries. And while it is not a corporation, it, by the agreement, took some of the attributes of a corporation in so

far that, through its trustees, certificates of shares in the equity to the property held by them were issued, and were transferable in like manner, apparently, as are those of corporations. They are transferable on the books of the trustees, and until that is done, it is said that the holder is not a beneficiary of the trust. And it is further urged that it does not appear that the plaintiff is entitled to that relation, because the right to transfer upon the books depends upon the provisions of the agreement and by-laws and compliance with them in that respect; and as they were not put in evidence, the conditions requisite for the purpose do not appear. It is true that the burden was with the plaintiff to show that he was entitled, within the meaning of the agreement and by-laws, to the relation of a transferee or beneficiary, and to have it perfected by transfer on the books. The fact that the shares were transferable, and were for sale in the open market, enabled the plaintiff to become the holder of those he did purchase. It may be observed that by the terms of the certificates the shares appear to have been "issued upon condition that the holder or any transferee thereof shall be subject to all the provisions of the agreement creating said trust, and of the by-laws adopted in pursuance of said agreement as fully as if he had signed the said agreement." This relation of holder was given the plaintiff when he became such by taking the transfer from Mallaby. It is said that this does not constitute him a transferee, and that transfer on the books was essential to that relation and to make him a beneficiary. By the terms of the certificate, the holder and transferee are alike subject to the provisions of the agreement upon which the trust is founded. But to give him the character of transferee for the purposes of recognition by the trust, the transfer on the books is requisite, inasmuch as the shares are transferable only upon them. This is for the benefit and protection of the trust: *Bank of Utica v. Smalley*, 2 Cow. 770; 14 Am. Dec. 526. The holder, as between him and his assignor, having the title, would seem in some sense to be a beneficiary of the trust, since he is subject to all the provisions of the agreement on which it is founded and its by-laws.

The allegations in the complaint of what purport to be the nature, purpose, and effect of the agreement are, by the defendants' answer, admitted. The fact thus appears that the shares are transferable on the books of the trustees. From that arises the inference that the conditions were applicable alike to all

purchasers and holders. And this quality of the shares is recognized by the terms of the certificate and of the blank indorsement for transfer upon the back of and accompanying it, in which, when filled out, appears the name of the person designated by the transferrer as his attorney to make the necessary transfer upon the books of the trust in accordance with the regulations thereof, and upon the conditions expressed in the certificate. Those conditions are, that the transferee shall be subject to all the provisions of the agreement creating the trust, and of the by-laws adopted pursuant to it. The quality of transferability given to the shares would seem to import the right to make it effectual by transfer on the books, as that is treated as essential to accomplish it. And when the plaintiff applied to have it done, it may, in view of what appears in the indorsement upon the certificate as well as in it, be assumed that he sought to have the transfer made to him upon the books of the trust "in accordance with the regulations thereof," and upon the conditions in the certificate. They seem to relate to the manner and effect of doing it, and not to the right to have it done. And, therefore, when the essential fact of the transferability of the shares and the general nature and purpose of the trust as created by the agreement were made to appear, as they did by the admitted allegations of the complaint, there was nothing wanting in the evidence to establish the right of a holder of shares to effectually become a transferee. And it cannot be presumed that there were in the agreement any negative provisions qualifying such apparent right. If there were any such, it was for the defendants to make it appear.

In *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211, the question arose upon demurrer to the complaint, which did not allege any facts tending to show that transfer of shares of stock on the books of the company was requisite to perfect it, and it was held that if it was not, no transfer upon them was necessary for such purpose. The defendants here claim that the holder of shares in the trust is not entitled to recognition as such, or as transferee, until transfer is made on their books, and, accordingly, it appears that they declined to treat him as a beneficiary for the purpose of receiving dividends upon the shares he had purchased, but paid them to Mallaby, who was named in the certificate as such, and, as the consequence, the plaintiff was not permitted to take any dividends or rights as holder of the shares otherwise than through him. The de-

nial of the right to transfer upon the books is not consistent with the transferable quality of the shares, which imports that the purchaser taking an assignment of them in a duly formal manner has the right to become a transferee within the meaning of the agreement upon which the trust was formed. And it is difficult to see any substantial distinction in that respect between a holder of such shares and of those of a corporation which are transferable only upon its books. In such case it is within the equitable power of the court to compel such transfer to be made: *Cushman v. Thayer M. J. Co.*, 76 N. Y. 365; 32 Am. Rep. 315. And unless some further reason appears for the denial of such right, the plaintiff was entitled to such relief in this action.

It is evident from what appears that the ground of the refusal of the defendants to grant the plaintiff's request to make the transfer on the books was personal to him. And they, amongst other matters, by their answer, charge, in effect, that the plaintiff, as competitor of the companies whose stock is held by the defendants in trust, in the business of manufacturing and dealing in oil products, is hostile to them, and that his demand for transfer of his shares on the books of the defendants is not in good faith, but that he seeks to vex and harass them. Upon that subject the trial court found that since in 1876 the plaintiff has been a competitor and rival of the constituent corporations of the Standard Oil Trust, and since its creation he has been such of the trust in the business of oil-refining, and has maintained a hostile attitude and been engaged in hostile transactions and proceedings towards those companies, the trust, and the defendants as trustees; that he believes an oil trust ought not to exist, and is opposed generally to trusts of that character; and that since that time to the commencement of this action he has been prosecuting or aiding in prosecuting litigations and proceedings in courts as well as before the interstate commerce commission, and before an investigating committee in Congress, directed mainly and in effect against such corporations, or the trust, for the purposes of securing from the railroads what he considered equal rates with those corporations and such trust for carrying his products. The court also found that the plaintiff, "having for ten or more years been engaged in the oil-refining business at Marietta, Ohio, had suffered from discrimination in freight rates for the transportation of oil, by various railroad companies, against him, and in favor of his competitors in the trade;

that the litigations instituted by him before the interstate-commerce commission against a number of railroad companies were conducted by the plaintiff in good faith, and for his protection from unjust discrimination against him on freight charges by them in such transportation; and that in *quo warranto* suits of the state of Ohio against certain named railroad companies, it was found as a fact, and determined by the referee in each of them, that a discrimination in freight rates for transportation of oil existed greatly to the injury of the business of the plaintiff in this action; and that his connection with those suits "was in good faith wholly justifiable, and in the protection of his legal rights." The facts so found by the court in the present action had the support of evidence. And it also appears that the plaintiff proposed and offered to sell his oil property and works to the defendants for a sum greatly in excess of their value, and that in December prior to the creation of the trust he published a severe pamphlet against the Standard Oil Company, which became one of the constituent companies of the trust. In this publication he manifested his hostility to the company for reasons as expressed in it, having relation to its rival business methods, which he charged were conducted in a manner and with a purpose to injure and oppress him in his business of like character. In view of all these facts, it is urged by the defendants that the motives of the plaintiff in seeking to become a recognized member of the association and beneficiary of the trust were such as to justify the refusal to permit him by transfer of his shares on its books to take such relation to it. The question of motive, of the plaintiff, so far as it had any essential bearing in the case, was one of fact. And upon that subject the plaintiff testified that he had no hostile purpose in purchasing the shares and in seeking a transfer of them on the books, but that it was his "idea, if possible, to become a record stockholder, in order to enjoy the ordinary legal rights of a stockholder." And the trial court determined that there was nothing in the relations of the plaintiff to the defendants and the trust that should prevent such transfer on the books of the defendants. The plaintiff purchased the shares in the trust with his own money, and he represents no interests or purposes other than his own in this action. His claim is founded upon a right of property lawfully acquired. He, as holder, became subject to the agreement by which the trust was created, and its by-laws, and if the transfer to him is per-

ected, he will necessarily continue in such relation of subjection to them. When no discretionary power is reserved to that effect, there is not, nor should there be, any rule of law which will enable a corporation or company whose stock is on sale in the open market to so discriminate between *bona fide* purchasers who invest money in it for their own benefit as to deny to some of them the right to make their title effectual for recognition by the company in the manner provided by it for that purpose. The perfection in such case of the transfer is one of apparent right incident to the purchase, and which the holder who thus acquires the stock in the market is permitted to assume will be effectuated: *Weston's Case*, L. R. 4 Ch. 20.

A discretion in that respect, when given or reserved by the articles under or pursuant to which the company is organized, or in any manner requisite to vest the power in those charged with its executive duties, may be effectually exercised: *In re Stranton etc. Co.*, L. R. 16 Eq. 559; *Moffatt v. Farquhar*, L. R. 7 Ch. Div. 591.

In the present case, no such discretionary powers seem to have been vested in the trustees. And the purchase of the stock was open to the plaintiff, and fairly made by him. Attached to it was the quality of transferability, and with it was presumptively the right of the beneficial holder to have recognition as such by means of transfer to him on the books of the trust. And this was essential to the protection of his rights derivable from the title. The remedy sought by the plaintiff is within the equitable powers of the court, and is founded upon an indubitable title, as between him and his vendor, and a right in property. In such case it is difficult to see that motive legitimately becomes a subject of consideration, unless the relief in view may for that reason result unjustly to others in whose behalf it is resisted, or to the prejudice of their legal rights: *Bloxam v. Metropolitan R'y Co.*, L. R. 3 Ch. 337; *Ramsey v. Gould*, 57 Barb. 398, and cases there cited. And how that could be the consequence is not evident. The transfer on the books to the plaintiff does not change the identity of the shares, but merely substitutes for one another beneficiary, and the latter is subject to the trust agreement and by-laws. It is true that equitable considerations not recognized in courts of law may control results in courts of equity. And while the granting of relief there is in some sense matter of discretion, it is not an arbitrary or capricious

but a sound judicial discretion, controlled by established principles in equity, and exercised in view of the circumstances in each case: 3 Pomeroy's Eq. Jur., sec. 1404. The party seeking relief must come into court with clean hands, as such maxim is understood in its application to that relation. If, for instance, he appears there under false colors, his complaint may for that reason be dismissed. Such was the case of *Forrest v. Manchester etc. Ry Co.*, 4 De Gex, F. & J. 126. There a party filed his bill in behalf of himself and all other share-holders of the defendant company to restrain it from running its vessels, etc. It appeared at the trial that he was also a share-holder in a rival company; that by its direction he instituted the suit, and by it was indemnified against costs. The bill was dismissed, and on review the lord chancellor, in holding that the bill was an imposition on the court, and sustaining its dismissal, said: "It is not that they persuaded him to institute the suit, not that they instigated the suit, but that the directors of the other company have directed the suit, and are to indemnify the plaintiff against the costs of it. To use a familiar expression, the plaintiff is the puppet of that company." And he added: "I have nothing to do with the motives of plaintiffs suing in this court. If they come here in a *bona fide* character, the reason for their coming here is a matter beyond the province of a court of justice to inquire into." In the present case the plaintiff's claim to relief is founded upon his own title to the shares in question, and the action was instituted and prosecuted solely for his own benefit. The relief by way of transfer of his stock upon the books of the trust is not of itself unconscionable. Nor is it seen how it can be prejudicial to any legal rights of the defendants, or any other beneficiary. It is not so much to the perfected title in the plaintiff of the shares that the defendants object, as it is to the relation which he will, as the consequence of the transfer on the books, take to the trust; nor so much to relief in his behalf, as in the alleged apprehension of consequences which may follow its execution. And those are dependent upon the manner he may conduct himself in that relation, whether offensively or otherwise. Whether the plaintiff would seek to do anything other than that which legitimately pertained to the right of a stockholder is entirely speculative; and it is not seen that anything more than that could be accomplished by him in such relation. The objection before mentioned might be made against any holder of

stock, and the reason for its support would be one of degree. It has no relation to the plaintiff's legal right founded upon his title; but the court is called upon to make inquiry beyond that, and into his motives or purposes by which his conduct and actions towards the trust may be influenced if he becomes its recognized beneficiary. As said by a learned text-writer: "When a court of equity is appealed to for relief, it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party, in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands": 1 Pomeroy's Eq. Jur., sec. 399. Assuming that there may be reasons for denial of relief in an action within equitable jurisdiction there sought, and founded upon unquestionable title fairly obtained, they must be such as to make it appear that the relief may result oppressively or to the undue prejudice of the defendant. In the case at bar the plaintiff's title to the stock derived from his purchase is not challenged by the evidence, but the ground of the defense is in the standing of the plaintiff in his relation to the trust, of which the defendants are trustees. And this is based upon the fact that his was an attitude of hostility to the Standard Oil Company, and after its creation to the Standard Oil Trust, arising out of rivalry in business. This may be a reason for making his recognition as a beneficiary undesirable. But while there may be an inherent power or discretion in the trustees of a corporation or company when its due protection requires or justifies it to decline to perfect title to stock by transfer on the books, it cannot be supposed, unless the power is duly reserved to or conferred upon them, that they are for that purpose permitted to discriminate between *bona fide* purchasers who are owners and holders of its stock having assignment duly and in due form made to support application for such transfer. And in view of the facts found by the trial court, and the preponderance of evidence, as we view it, there seems to be no sufficient reason founded upon the plaintiff's relations to the defendants or to the trust, or otherwise, to fairly justify a denial to him of the rights of any holder in good faith of the stock of the trust.

The suggestion that the plaintiff should not have equitable relief because he has an adequate remedy at law for damages requires no consideration, as that question does not appear to

have been specifically raised upon the trial, or for determination of the trial court.

And in view of the fact that the shares of the trust were unqualifiedly transferable, there seems, for the purposes of the relief, to be no practical or substantial reason to distinguish between them and those of a corporation. There are no exceptions requiring special consideration. These views lead to the conclusion that the order of the general term should be reversed, and the judgment entered on the decision of the special term affirmed.

TRANSFERS OF CORPORATE STOCK — RIGHTS OF HOLDERS OF CERTIFICATES. — Corporation which issues certificate of stock, stating on its face that it is transferable, has not a lien on such stock as against a purchaser thereof, and the purchaser may therefore compel transfer of such stock to him on the books of the corporation: *Fitzhugh v. Bank of Shepherdsville*, 3 T. B. Mon. 126; 16 Am. Dec. 90. An insurance company cannot refuse to transfer stock on its books on the ground that the assignor is indebted to the company: *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306. Assignee of stock in railroad company, on which an installment remains unpaid by the original subscriber, may, upon properly tendering same, with interest, maintain a suit in equity to compel the issuing to him of a stock certificate: *Iron R. R. Co. v. Fink*, 41 Ohio St. 321; 52 Am. Rep. 84. The possession of the certificate will enable the holder to compel transfer as against one to whom stock has been transferred on the books only: *Cushman v. Thayer Mfg. etc. Co.*, 76 N. Y. 365; 32 Am. Rep. 315. Such a certificate is an assurance to the commercial world that the shares of stock are the property of the person designated, and that he has the power and right to transfer and sell the stock, until this power and right have been lawfully terminated: *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183.

TRANSFERS OF CORPORATE STOCK — RIGHT OF DIRECTORS TO CONTROL TRANSFERS. — Corporation can avail itself of provision in its by-laws that transfers of stock shall not be valid unless approved by the board of directors only for the purpose of protecting itself against irresponsible stockholders, not to defeat rights of third persons: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398. Stockholders in a corporation have the indisputable right to dispose of their stock at their pleasure: *Trisconi v. Winship*, 43 La. Ann. 45; 26 Am. St. Rep. 175.

CORPORATE STOCK, ACTION FOR REFUSING TO TRANSFER. — Action lies for damages against a private corporation for refusal to transfer stock on the books to one entitled: *Kimball v. Union Water Co.*, 44 Cal. 173; 13 Am. Rep. 157; *Baltimore City etc. R'y Co. v. Sewell*, 35 Md. 238; 6 Am. Rep. 402; *Morgan v. Bank of North America*, 8 Serg. & R. 73; 11 Am. Dec. 575; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306; *Commercial Bank v. Kortright*, 22 Wend. 348; 34 Am. Dec. 317; *Bond v. Mount Hope Iron Co.*, 99 Mass. 505; 97 Am. Dec. 49.

GOUVERNEUR v. NATIONAL ICE COMPANY.

[184 NEW YORK, 355.]

GRANT OF LAND BOUNDED ON SMALL INLAND LAKE EXTENDS TO ITS CENTER.

—In the state of New York, the presumption is, that land under the waters of small inland non-navigable lakes and ponds belongs to the proprietors of the adjoining lands, and in the construction of grants of land bordering and bounded on such waters the same rule is applied that is applicable to conveyances bounding lands on fresh-water streams. And therefore a conveyance of land bordering on such a lake or pond, which describes it as running to the pond, or to some monument on the land at the water, and thence along the pond to another monument on its bank, unless restricted by express words or otherwise, carries the title to the center of the pond; and the fact that the lines along the pond are described by courses and distances running from one monument on the bank to another, and that the length of these lines is the distance between the monuments, is no evidence of an intent to restrict the grant so as to exclude the bed of the pond.

EJECTMENT to recover possession of the premises described in the opinion. The facts are stated in the opinion.

Calvin Frost, for the appellant.

Eugene Frayer, for the respondents.

BRADLEY, J. The defendant alleges several defenses, and the one founded upon the denial of the plaintiffs' title is, that their ancestors conveyed the premises in question by deeds to certain grantees many years before this action was commenced. If this proposition of fact is sustained, the other alleged defenses will require no consideration.

The premises which are the subject of controversy consist of a body of water formerly known as Hinckley Pond, and later as Croton Lake, and land under the water, situated in the town of Patterson, county of Putnam. This is a natural pond, or lake, about 151 rods in length, and in the broadest place about 48 rods in width, and covers about 45 acres. It has two inlets at the southerly end, and an outlet, known as Muddy Brook, at the north end; and the court found that there was a slight and very sluggish current running through the pond from south to north. The plaintiffs do not claim title to any of the land adjacent to the lake, as that was all conveyed by their ancestors by five deeds made in the years 1796, 1813, 1828, and 1845. Natural ponds and small lakes are private property. They pass by grant of land in which they are included. They are also presumed, if nothing appears to the contrary, to belong to the riparian owners. And there would

seem to be no substantial reason for the application of a different rule in the legal construction of grants of land bounded on them, than is applied to conveyances bounding premises on fresh-water streams. Our attention has been called to no case in this state where the question has arisen and essentially been the subject of determination.

In *Canal Comm'rs v. People*, 5 Wend. 423, and in *Canal Appraisers v. People*, 17 Wend. 597, the chancellor said: "The principle itself does not appear sufficiently broad to embrace our large fresh-water lakes, or inland seas, which are wholly unprovided for by the common law of England," and that a different rule must probably prevail as to them, "and also as to those lakes and streams which form the natural boundaries between us and a foreign nation."

A like remark was made in *Smith v. City of Rochester*, 92 N. Y. 463, 44 Am. Rep. 393, by Judge Ruger, who added: "We have arrived at the conclusion that all rights of property to the soil under the waters of Hemlock Lake were acquired by and belong to its riparian owners." Hemlock Lake is about seven miles long and a half-mile in width. And the fact that the title to the land in western New York, within which is Hemlock Lake, was not derived from this state was not deemed and is not important upon the question of its proprietorship, because it came within the class of small lakes, the bed of which is the subject of private ownership.

In *Ledyard v. Ten Eyck*, 36 Barb. 102, it was held that land conveyed by deed bounding it on Cazenovia Lake, which was five miles long and three fourths of a mile in width, extended to its center. But the conclusion reached in that case may have been supported upon another ground, which was there considered.

In *Wheeler v. Spinola*, 54 N. Y. 377, the question was considered in its application to a pond, the size of which does not appear; and it was there said that "a boundary upon it does not carry title to its center, but only to low-water mark. Such is the rule as to boundaries upon natural ponds and lakes"; and in support of the proposition are there cited: *Canal Comm'rs v. People*, 5 Wend. 423; *Champlain etc. R. R. Co. v. Valentine*, 19 Barb. 484; *Waterman v. Johnson*, 13 Pick. 261; *Bradley v. Rice*, 13 Me. 198; 29 Am. Dec. 501.

In the commissioners' case the relator claimed certain rights in the Mohawk River, which he alleged were impaired by the plaintiffs in error; and the railroad company case had

relation to alleged rights in Lake Champlain, which is a large navigable lake about one hundred and thirty miles in length, and varying from about fifteen miles to less in width. This is a large navigable lake, and the Mohawk has been held to be a public river. Those two cases seem to have no necessary application to the present one. Reference further on is made to the other two cited cases.

The controversy in *Wheeler v. Spinola*, 54 N. Y. 377, had relation only to a strip of land between high and low water mark on the south side of Flax Pond, upon which strip the defendant was charged with committing trespass in cutting thatch; and as the title under which the defendant claimed was by deed bounding the land upon the pond, it was held to extend to low-water mark. This covered the *locus in quo*, and was as far as the court was called upon to go for the purposes of the defense. While the views of the learned judge upon whose opinion that case was decided are entitled to much weight, the question now under consideration was not there necessarily considered or determined. And so far as we are advised, it remains in this state an open one for consideration. There is a conflict of authority upon the subject by adjudication in some of the other states. And in holding that by conveyances bounding lands on natural ponds the grantees take title only to low-water mark, Massachusetts seems to have taken the lead: *Waterman v. Johnson*, 13 Pick. 261. That case was decided in 1832. There was a reason for such rule in that state in the fact that by a colonial law or ordinance adopted in 1641, and amended in 1647, great ponds, which were defined as those containing more than ten acres, were declared public property, and after this ordinance was so amended in 1647, such ponds have not been subject to private ownership: *West Roxbury v. Stoddard*, 7 Allen, 158; *Hittinger v. Eames*, 121 Mass. 539. And after referring to *Ledyard v. Ten Eyck*, 36 Barb. 102, and to what was there held in relation to the proprietorship of Cazenovia Lake, Mr. Justice Hoar, in the West Roxbury case, added that the state of New York had no statute similar in its provisions to the Massachusetts ordinance before mentioned.

In *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501, decided in 1836, the question was not discussed, but the court said that no case had been cited or found where the rule of construction applicable to boundaries on streams had been extended to a pond or lake, and cited *Waterman v. Johnson*, 13 Pick. 261, to

the contrary. It is unnecessary to refer to the relation to the colony and state of Massachusetts of the territory constituting the state of Maine up to the time of its admission as a state into the Union, as such previous relation may be entitled to no consideration from the time it became a state.

In *State v. Gilmanton*, 9 N. H. 461, the question was, whether the town of Gilmanton was chargeable with repairs of a bridge over what may be termed the outlet of Winnepissiogee Lake, and that was said to be dependent on the fact whether the place crossed by the bridge was a river or bay. It was the boundary of the town; and it was accordingly held that if a river, the line of the town would go to the center, and only to the water's edge if a bay. This question of fact was reserved for trial. The cases cited in support of the proposition were *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447, and *Canal Comm'rs v. People*, 5 Wend. 423. And the court there added, that such seems to have been the legislative construction, in that state, of grants bounding land on lakes and ponds, as appears from the annexation of islands to the towns adjacent, etc.

In *Kanouse v. Slockbower*, 48 N. J. Eq. 42, it was held that the line bounding the land on the pond or lake was in terms confined to the edge of it, and for that reason, as well as in construction of law, the land devised embraced none under the water nor any beyond low-water mark. The proposition that the rule applicable to boundaries on fresh-water streams does not apply to lakes or ponds was held in *Boorman v. Sunnuchs*, 42 Wis. 233, and *Diedrich v. Northwestern etc. R'y Co.*, 42 Wis. 248; 24 Am. Rep. 399. And the same in *Trustees of Schools v. Schroll*, 120 Ill. 509; 60 Am. Rep. 575. In *Fletcher v. Phelps*, 28 Vt. 257, there was really no question that the boundary of the land on Lake Champlain was other than at low-water mark. And the court, referring to the rule relating to boundaries of land on a fresh-water stream, added that a different rule prevails where land conveyed is bounded on large natural ponds or lakes, and cites the *Waterman* and *canal commissioners* cases. The determination of some of the cases above cited is founded upon the proposition that the riparian owners do not have titles to lakes and ponds. And in *Paine v. Woods*, 108 Mass. 169, Mr. Justice Gray said that "the question whether the title in the land under a great fresh-water pond, or lake, is in the proprietors of the lands adjoining, or in the crown, does not seem to have been ever

judicially determined in England"; and cites *Marshall v. Ulleswater Steam Nav. Co.*, 3 Best & S. 732, where the question whether the soil of lakes *prima facie* belongs to the riparian owners on either side *ad filum aquæ*, or whether it belongs *prima facie* to the king, was raised and undetermined. But, later, it was held that the right to the soil of non-tidal lakes was not necessarily in the crown: *Bristow v. Cornican*, 3 App. Cas. 641. Whatever may be the doctrine applicable to small inland lakes and ponds elsewhere, the presumption in this state is, that the land under their waters belongs to the proprietors of the adjoining lands: *Smith v. City of Rochester*, 92 N. Y. 463; 44 Am. Rep. 393. Such is the common-law rule in the states where the grantees of land so situated and described by boundary in grants as on or along such waters take to the center: *Rice v. Ruddiman*, 10 Mich. 125; *Clute v. Fisher*, 65 Mich. 48; *Ridgway v. Ludlow*, 58 Ind. 248; *Lembeck v. Nye*, 47 Ohio St. 336; 21 Am. St. Rep. 828. And in *Ridgway v. Ludlow*, 58 Ind. 248, it was held that prescriptive right acquired by adverse possession to land adjacent to such a lake extended to the middle of it.

In *Hardin v. Jordan*, 140 U. S. 371, the subject had very thorough consideration, was elaborately discussed, and the conclusion there reached and adopted by a majority of the court was, that by the common law the grantee of lands bounded upon an inland non-navigable lake or pond takes title to its center. The lake there in question is in the state of Illinois, and is two or three miles in length. And the court reviewed the case of *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575, which was criticised, held not to have correctly declared the common law applicable to that state, and was disregarded as authority on the subject. This is in harmony with the rule in our state, that the title to the soil under such waters is in the riparian owners; and analogously to that relating to the conveyance and proprietorship of lands bounded on fresh-water streams, it would seem for the same reason to be alike applicable to such lakes and ponds.

The reason for the distinction in the cases where it has been recognized has not been the subject of much discussion by the courts. But a reason given by Judge Gresham in *State of Indiana v. Milk*, 11 Fed. Rep. 389, had relation to the inconvenience or difficulty in locating in the lakes the lines of the several proprietors of the uplands. He was dealing with a lake covering fourteen thousand acres. But he

added that "a person might, by purchasing the lands surrounding a lake, in view of the size and other circumstances, be held to own the bed. Each case depends largely on its own facts."

While a lake may be of such form as to render the designation in it of the lines of the several riparian owners in certain cases somewhat difficult, that fact in its relation to the practical effect of the rule is not an objection to its general application. No case will probably arise in which their respective rights in that respect may not be ascertained and defined in reference to the location and extent of the boundaries of their lands on or along the lake. Bends or bays in rivers may, to some extent, present like difficulties. The value, such as they have, of small non-navigable lakes and ponds, as a general rule, is mainly in their relation to the adjacent lands. There may, however, be exceptional cases. The pond in question has, since the conveyance of the surrounding lands, become useful in its production of ice, by reason of railroad facilities for transportation of it to market. But this fact, and the extent of the business, and of the preparations made there by the defendant to carry it on, have no bearing upon the question we are now considering. The inquiry has relation to the title in the soil under the water of the pond or lake. The views already given lead to the conclusion that the common law relating to the construction and extent of grants of land bordering and bounded on such waters is applicable alike to conveyance bounding lands on fresh-water rivers and small non-navigable lakes or ponds. Such is the character of the one in question; and whether its bed was embraced in or excluded from the grants made by the deeds before mentioned is dependent upon their construction. The boundaries are described as along the pond; and unless in some manner qualified or restricted, they, by legal construction, had the effect to embrace its bed within their grants. This, in such case, is the presumed intent, unless the contrary appears: *Luce v. Carley*, 24 Wend. 451; 35 Am. Dec. 637; *Ex parte Jennings*, 6 Cow. 518; 16 Am. Dec. 447; *Mott v. Mott*, 68 N. Y. 247.

It is, however, urged that as in the last three of those deeds the lines along the pond are described by courses and distances, the intent thus appears to restrict the grants to those lines, and that such is the legal effect. It may be observed that the outer boundary of the waters of the pond are represented by courses and distances as appears by the deeds; and since they

are described as along the pond, was the boundary in legal effect necessarily so restricted by that method of description as to exclude the bed from the grants? A boundary line described as "along the shore" of a fresh-water stream does not extend the grant to its center: *Child v. Starr*, 4 Hill, 369; and a like construction is applicable to a boundary by the bank of such a stream: *Starr v. Child*, 5 Denio, 599; *Halsey v. McCormick*, 13 N. Y. 296. In those cases the prescribed limitation of the boundary lines to the shore and bank did not permit the extension of the grant by construction to the thread of the streams. And the same may be said of *People v. Jones*, 112 N. Y. 597.

Our attention has been called to cases relating to conveyances of lands adjacent to highways where it was held that a line described as running along a highway from and to monuments located on one side of it did not vest in the grantee title to its center, but by the terms of the description the road-bed was excluded: *Jackson v. Hathaway*, 15 Johns. 447; 8 Am. Dec. 263; *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287; 41 Am. Rep. 361; *Smith v. Slocomb*, 9 Gray, 36; 69 Am. Dec. 274. While there is, in legal effect, analogy between the boundary of grants on highways and streams, there is this distinction: that it is not practicable to locate monuments in the channels of the latter, and it is usual to refer in the description of boundary to their location adjacent to the water to mark the place of intersection with the stream.

In *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637, among the courses in the description of the premises were those to a hemlock stake "standing on the east bank of the river, from thence down the river as it winds and turns, twenty-four chains and ninety-four links, to a hard maple tree," etc. This maple tree, as appears by the opinion of the court, was described as standing on or near to the east bank. And in holding that the grantee took title to the center of the river, the court said: "It is never thought that monuments mentioned in such a deed as occupying the bank of the river are meant by the parties to stand on the precise water line. . . . They are used to fix the *termini* of the line which is described as following the sinuosities of the stream. . . . Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, if it be above tide, one half the bed of the stream is included by construction of law. If

the parties mean to exclude it, they should do so by express exception."

In *Child v. Starr*, 4 Hill, 375, the chancellor remarked that "running to a monument standing on the bank, and from thence by the river or along the river, etc., does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the direction of the lines to the river, and not as restricting the boundary on the river."

In *Seneca Nation of Indians v. Knight*, 23 N. Y. 498, the boundary of the land was described as beginning at a post standing on the bank of Lake Erie, at the mouth and on the north side of Cattaraugus Creek, and after describing other lines, proceeded, "thence . . . to a post standing on the north bank of Cattaraugus Creek; thence down the same, and along the several meanders thereof, to the place of beginning." It was held that the grant was to the center of the creek. The court there referred to and approved the remark, before mentioned, of the chancellor in *Child's* case, and added: Parties may restrict their grants, "but the restriction ought to be found in very plain and express words." And in *Kings County Fire Ins. Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 361, the court cited with approval the *Seneca Nation* case, and in like manner noticed such remark of the chancellor in *Child's* case.

Inasmuch as a boundary by or along a watercourse is effectual to take the grant by legal construction to its thread, it would seem that the application of the courses and distances of the boundary along the water of the stream may not be treated as qualifying the effect which would be given to the grant if they were omitted. If the boundary were not expressed as along the pond, it might and would be assumed that there was an intent to so restrict. And it may be observed that the courses and distances between the outer lines intersecting it are not controlled by any monuments given in the deeds other than along the pond.

A question somewhat similar to this arose in *Rix v. Johnson*, 5 N. H. 520; 22 Am. Dec. 472. There the boundary on a river was described by courses and distances between the two points of intersection of the outer lines with the stream by reference to monuments located near it; and it was held that the boundary was in the river. The present case is distinguishable from those where the line is described as along the

shore or on the bank. Here there is nothing in the terms of the deeds which places the boundary along there outside the water of the pond. The boundary is described as along the pond. The courses and distances given represent the sinuosity of the line of connection of the water with the shore; and the boundary as described along the pond, as generally understood, means on its water. And the fact that the length of the lines running to and from the monuments at the pond is the distance to and from them on the bank does not of itself affect the question. Such is usually the case of the description of land bounded on streams in which the grants are treated as *ad filum aquæ*. And as said by Mr. Justice Cowen in *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637, where the grant is so framed as to touch the water of the river, one half the bed of the stream is included by construction of law. This, of course, means to the extent of the boundary in contact with the water.

It is a matter of common knowledge, in respect to lands bordering on streams and other bodies of water, that it is usual in surveys, when made, to so describe the uplands as to compute the number of acres they contain, as generally in them, exclusive of the soil beneath, the water is mainly the value, and the quantity of the uplands embraced in a conveyance constitutes, in view of the situation, the basis for the measure of the consideration.

The conveyances embracing the land surrounding this lake or pond were made many years ago. No circumstances appear bearing upon the purpose, construction, or effect of those conveyances inconsistent with the intent of the grantors to include its bed within them.

If these views are correct, the conclusion of the trial court that the plaintiffs had no title to the *locus in quo* was justified by the evidence.

And the order should be reversed, and the judgment affirmed.

WATERS AND WATERCOURSES. — The rights of riparian owners in waters fronting their lands are discussed in the note to *Miller v. Mendenhall*, 19 Am. St. Rep. 226-234; and boundary lines upon waters, in the note to *Allen v. Weber*, 27 Am. St. Rep. 56-63. In the note to *Miller v. Mendenhall*, 19 Am. St. Rep. 230, 231, will be found some remarks as to the ownership of the soil under navigable and non-navigable lakes. In *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828, it was held, as in the principal case, that a conveyance of land bounded on a non-navigable lake passes title to the center of the lake. The same rule prevails in Indiana: *Stoner v. Rice*, 121 Ind. 51; and in Michigan: *Clute v. Fisher*, 65 Mich. 48. In addition to the authorities for the opposite view, mentioned by the court, may be mentioned: *Stevens*

v. *King*, 76 Me. 197; 49 Am. Rep. 609; following *Wood v. Kelley*, 30 Me. 4, and *Delaplaine v. Chicago etc. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 381. The thread of the stream was held to be the boundary, under a description which ran: "to a tree on the bank of a river, thence up said river," etc., in *Kent v. Taylor*, 64 N. H. 489; and the same effect given to the words, "thence . . . to a tree on the bank of N. river, and hence up said river until," etc., in *Taylor v. Blake*, 64 N. H. 392.

VOLKMAR v. MANHATTAN RAILWAY COMPANY.

[184 NEW YORK, 413.]

NEGLIGENCE PRESUMED FROM HAPPENING OF INJURIOUS ACCIDENT WHEN

— When a person passing along a street under an elevated railroad is struck and injured by a broken bolt attached to an iron plate or clip, which falls upon him from the structure above, a presumption arises that there was negligence on the part of the railway company in permitting the structure to get out of repair; and this presumption is not overcome by the testimony of its track-walker and inspector, to the effect that it was his duty to examine carefully all the rails, switches, signals, bolts, and fastenings of all kinds, and to keep them tight, and that he performed this duty to the best of his ability. But even if this evidence were sufficient to remove the presumption, still the credibility of the witness would be involved, and be a question for the jury, since he would be a person interested, and possibly actuated by a motive to shield himself from blame, and it would be error to direct a verdict for the company.

Edwin R. Leavitt, for the appellant.

Brainard Tolles, for the respondent.

HAIGHT, J. This action was brought to recover damages for a personal injury.

On the 24th of June, 1885, the plaintiff was driving along Sixth Avenue, in the city of New York, in a wagon, going uptown under the defendant's elevated railroad structure. When near Thirty-ninth Street, an iron plate or clip, with a part of a broken bolt, fell from the structure, striking him upon the shoulder, causing the injury for which this action was brought.

It appears that the bolt was about fourteen inches long; that it passed through the guard-rail of the defendant's road, the stringer upon which it rested, and an iron plate or clip underneath, which was held in place by a nut upon the end of the bolt; that the bolt was broken about two inches from the nut.

These facts having been shown, the plaintiff rested. Thereupon the defendant introduced evidence showing a proper construction of its elevated railway, and then called Samuel S.

Roach as a witness, who testified that he was the defendant's track-walker and inspector at the place where the injury was received by the plaintiff; that it was his duty to move carefully over the track, during the daytime, to examine carefully all the rails, switches, signals, bolts, and fastenings of all kinds, and to keep them tight; that in June, 1885, he was engaged in following out his instructions, and that he performed them to the best of his ability.

The defendant's counsel then moved the court to direct a verdict for the defendant, which motion was granted.

The plaintiff asked permission to go to the jury upon the question of the defendant's negligence, upon the ground that the evidence showed that the presumption arose that the defendant was negligent, in view of the fact that the iron plate fell from its structure upon the plaintiff. This request was denied, and an exception was taken by the plaintiff to such denial, and to the direction of a verdict in favor of the defendant.

No question is made but that the defendant's elevated railroad was properly constructed. It is claimed, however, that it was negligently suffered to get out of repair, and that because of such negligence, the plaintiff suffered the injury complained of.

It was the duty of the defendant to exercise ordinary care, for the purpose of keeping its structure in proper repair, so as to prevent injury to persons passing over or underneath it.

The evidence showed that the bolt was broken, and that in consequence the iron plate or clip fell upon the plaintiff. The structure was consequently out of repair, and under the circumstances I think the presumption of negligence follows.

It has been held that where a building adjoining a street falls into the street, in the absence of explanatory circumstances negligence will be presumed, and the burden is placed upon the owner of showing the use of ordinary care; that where a plaintiff was passing on a highway under a railroad bridge, when a brick fell from one of the pilasters upon which an iron girder of the bridge rested, striking him upon the shoulder, causing injury, negligence would be presumed; that where a barrel rolled out of the window of a warehouse onto a street, injuring a person passing, negligence would be presumed; that where a person, while walking along the street in front of a building, was struck by a falling chisel, the presumption of negligence is sufficient to call for an explanation; that

where plaintiff was injured while walking on the sidewalk of a street, immediately under the defendant's railroad, by being struck with a heavy piece of metal, which fell from one of defendant's cars passing above, that from the nature of the accident negligence might be inferred, etc.: *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530; *Kearney v. London R. R. Co.*, L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; *Byrne v. Boadle*, 2 Harl. & C. 722; *Cahalin v. Cochran*, 1 N. Y. St. Rep. 583; *Goll v. Manhattan R'y Co.*, 5 N. Y. Supp. 185; affirmed 125 N. Y. 714; *Payne v. Troy etc. R. R. Co.*, 83 N. Y. 572.

The learned general term, in its opinion, admits this proposition, and concedes that the fall of the plate or clip, in the absence of an explanation, raises a presumption of negligence. That court, however, reached the conclusion that the presumption was overthrown by the evidence produced on behalf of the defendant. As we have seen, that evidence was given by the witness Roach. It was his duty, as he testified, to examine carefully all rails, switches, signals, bolts, and fastenings of all kinds, and to keep them tight. He further states that in June, 1885, he was engaged in following out his instructions, and performed them to the best of his ability. In no place does he testify that he ever examined the bolt and clip which fell upon the plaintiff. He does not tell us how often he passed over the track, or to what extent he examined the bolts and fastenings. He only gives us his own conclusion that he performed his duty to the best of his ability. It does not appear to us that this was sufficient to remove the presumption, which necessarily follows from the established fact that the bolt was broken, and in that particular the structure was out of repair, and dangerous.

But even if this evidence was sufficient to remove the presumption, as held by the general term, the credibility of the witness would still be involved, and be a question for the jury. This witness was the defendant's track-walker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was therefore a person interested, and possibly actuated by a motive to shield himself from blame: *Dean v. Van Nostrand*, 23 Week. Dig. 97; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549-554; 6 Am. Rep. 140.

It is claimed that the plaintiff neglected to produce upon the trial the broken bolt. His counsel said it was lost. He had established a *prima facie* case when he rested. The burden

was then on the defendant. The upper portion of the broken bolt was left in the structure in the possession of the defendant, who could have produced it had it so desired.

The plaintiff should have been permitted to submit to the jury the question of the defendant's negligence.

The judgment should consequently be reversed, and a new trial granted, with costs to abide the event.

NEGLIGENCE—WHETHER PRESUMED FROM HAPPENING OF ACCIDENT. —The fact that a passenger is injured on a cable-car without fault of his own does not raise a presumption of negligence, casting the burden of proof on the railway company to disprove it: *Hawkins v. Front Street etc. R'y Co.*, 3 Wash. 592; 28 Am. St. Rep. 72, and note. Negligence will not be presumed from the mere fact of a fire, when there is no evidence of negligence in providing the proper apparatus for suppressing it, and the evidence is conjectural as to its cause: *Montgomery v. Muskegon Booming Co.*, 88 Mich. 633; 26 Am. St. Rep. 308, and note. Negligence is not presumed against the owner or driver of a horse from the fact that the horse attached to a cart ran away while in charge of the driver, and, in spite of his efforts to control him, injured a person in the street: *O'Brien v. Miller*, 60 Conn. 214; 25 Am. St. Rep. 320. For an extended discussion of accidents as evidence of negligence, see extended note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490. As to whether there is a presumption of negligence when an injury has been suffered, and there is no evidence showing who was at fault, see extended note to *Huey v. Gahlenbeck*, 6 Am. St. Rep. 792.

SABIN v. PHINNEY.

[134 NEW YORK, 423.]

BENEFIT SOCIETY, MEMBER OF, MAY DIRECT CERTIFICATE ISSUED IN FAVOR OF STRANGER. — A member of the Ancient Order of United Workmen of the State of New York can legally direct the sum to become due at his death to be paid to a stranger having no insurable interest in his life, since neither the statute under which the society is organized nor the by-laws of the society impose any limitation on the persons to whom certificates shall be payable.

APPOINTEE IN CERTIFICATE OF BENEFIT SOCIETY HAS NO VESTED INTEREST.

— An appointee in a certificate of membership in a benefit society acquires no vested interest in the sum payable thereunder of which he cannot be deprived without his consent, and the member may therefore, during his lifetime, at his will, change the appointee, from time to time, as he may elect.

ACTION upon a certificate of membership issued to John C. Sabin by the Grand Lodge of the Ancient Order of United Workmen of the State of New York, which was incorporated under the laws of the state. The statute authorized the cor-

poration to create subordinate lodges. One of the by-laws of the corporation was the following: "Sec. 17. Any member holding a beneficiary certificate, desiring at any time to make a new direction as to its payment, may do so by authorizing such change, in writing, on the back of his certificate, in the form prescribed, attested by the recorder, with the seal of the lodge attached, and by the payment to the Grand Lodge of the sum of fifty cents; but no change or direction shall be valid or have any binding force or effect until it shall have been reported to the grand recorder, the old certificate, if practicable, filed with him, and a new beneficiary certificate issued thereon, and said new beneficiary certificate shall be numbered the same as the old certificate." On the 22d of March, 1879, a subordinate lodge of the order duly issued to John C. Sabin a certificate entitling him to participate in the beneficiary fund of the order to the amount of two thousand dollars, to be paid to his wife, Ella A. Sabin, the plaintiff, at his death. In May, 1883, the husband and wife separated, and never lived together thereafter. Up to the time of their separation the husband paid the dues on the certificate. Afterwards, John C. Sabin resolved not to keep the certificate in force for the benefit of his wife, and he and A. S. Phinney, the defendant, who was in no wise related to him, agreed that Phinney should pay all subsequent dues, and that a new certificate should be issued, payable to him on the death of Sabin. To accomplish this, Sabin indorsed on the certificate a revocation of his former direction as to the payment of the beneficiary fund due at his death, and a direction for payment of said fund to be made by Phinney or his heirs. The original certificate, with the aforesaid indorsement, was delivered up and canceled by the officers of the Grand Lodge, who, on July 20, 1883, issued a new one precisely like it, except that it was payable to Andrew S. Phinney instead of to Ella A. Sabin. Phinney paid all the dues on this new certificate. Sabin died intestate on October 13, 1883. Mrs. Sabin and Phinney each claimed to be entitled to the fund payable by the terms of the certificate. The Grand Lodge did not contest its liability, and paid the amount into court.

De Merville Page, for the appellant.

George N. Orcutt, for the respondent.

FOLLETT, C. J. The appellant insists that the cancellation of the first certificate, which was payable to her, and the sub-

stitution of the second, which was payable to the respondent, were void for two reasons: 1. That the respondent had no insurable interest in the life of John C. Sabin; 2. That she, the wife, acquired, by virtue of the first certificate and its delivery to her, a vested right to the sum payable on her husband's death, of which she could not be deprived without her consent.

The statute under which the corporation was organized expressly provides that the funds "may be set apart and provided to be paid over to the families, heirs, or representatives of deceased or disabled members, or to such person or persons as such deceased member may, while living, have directed."

The by-laws of a corporation impose no limitation on the persons to whom certificates should be payable. It was held in *Massey v. Mutual Relief Soc.*, 102 N. Y. 523, that there being no restriction in the act under which the society was incorporated against making a certificate payable to a person in no wise related to the member, that a certificate issued to a stranger was not void as a wager policy. In that case the certificate was issued in favor of a person not related to the member, and who was not a member of the society; but in the case at bar the certificate was issued in favor of a member of the order. Under the statute and by-laws, a member of this corporation can legally direct the sum to become due at his death to be paid to a stranger having no insurable interest in his life: Niblack on Mutual Benefit Societies, sec. 178.

Did the plaintiff, by the certificate and its delivery to her, acquire a vested interest in the sum payable thereunder, of which she could not be deprived without her consent?

It is to be observed that the wife never paid any part of the expenses incident to the membership of her husband in this society, nor of her membership in the society to which she belonged, and no pecuniary consideration can be raised in her favor. The statute under which the corporation was organized, its by-laws, together with the application for and the certificate of membership, constituted the contract which existed between the member and the society, which instruments, construed together, measure the rights of these litigants: *Heltenberg v. District No. 1*, 94 N. Y. 580; *Sanger v. Rothschild*, 123 N. Y. 577; Niblack on Mutual Benefit Societies, sec. 166.

The relation which existed between Sabin and the society subjected him to certain burdens and entitled him to certain benefits during the continuance of his membership, and if he died while in good standing in the order, his appointee be-

came entitled to a certain sum. This relation could be terminated at any time, at the will of the member, and the appointee was changeable from time to time, as he might elect. If we choose to term this relation a contract, and it was established by agreement, the contract gave the right of change of the beneficiary with or without reason. Any person who became an appointee in such a certificate took the position subject to the absolute right of the member to substitute a new one at any moment. The rights acquired by the member by virtue of this relation did not amount to a chose in action. He had no interest in the society that was assignable or transferable until some right of action had accrued. The appointee had no vested interest in the sum which might in a contingency become payable on death of the member: *Hellenberg v. District No. 1*, 94 N. Y. 580; *Sanger v. Rothschild*, 123 N. Y. 577; *Brown v. Catholic Mutual Benefit Ass'n*, 33 Hun, 263; *Boasberg v. Cronan*, 9 N. Y. Supp. 664.

It being settled that an appointee under such a contract has no vested interest in the sum, the position taken by the plaintiff in this case becomes utterly untenable.

The judgment should be affirmed, with costs.

INSURANCE — WHETHER BENEFICIARY IN CERTIFICATE OF MEMBERSHIP OF MUTUAL BENEFIT SOCIETY ACQUIRES A VESTED INTEREST. — Where the laws of a mutual benefit society provide that a member may, after naming a beneficiary, surrender his certificate and procure a new one naming another person as beneficiary, such member does not, by naming a beneficiary and transferring the possession of the certificate to him, thereby convey to him any vested interest in the benefit during the life of the member: *Brown v. Grand Lodge*, 80 Iowa, 287; 20 Am. St. Rep. 420; *Titsworth v. Titsworth*, 40 Kan. 571; *Bagley v. Grand Lodge*, 131 Ill. 498. A designated beneficiary of a mutual benefit association has no interest or vested right in the fund or bounty of his donor until the death of the latter, and no consent of the former to a change of the beneficiary is required: *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519, and note; *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620. The rule seems to be different with regard to the rights of beneficiaries under a regular policy of life insurance: *Hooker v. Sugg*, 102 N. C. 115; 11 Am. St. Rep. 717, and note. See extended note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 786, in which the designation, change, and rights of beneficiaries of certificates in mutual benefit societies are discussed.

MUTUAL BENEFIT SOCIETIES — STRANGERS AS BENEFICIARIES. — The rights of strangers to take as beneficiaries under a certificate in a mutual benefit society is discussed in a note to *Bankers' etc. Ass'n v. Stapp*, 19 Am. St. Rep. 788.

OCEANIC STEAM NAVIGATION COMPANY v. COMPANIA TRANSATLANTICA ESPAÑOLA.

[134 NEW YORK, 461.]

PARTY COMPELLED TO PAY DAMAGES FOR ANOTHER'S NEGLIGENCE ENTITLED TO INDEMNITY. — A person who, without fault on his own part, has been compelled, by a judgment of a court having jurisdiction, to pay damages occasioned by the negligence of another is entitled to indemnity from the latter, whether contractual relations exist between them or not; and the right to such indemnity does not depend upon the fact that the wrong-doer owed to the party charged with the liability a special or particular duty not to be negligent.

PUBLIC PIERS, PERSONS CONTROLLING, BOUND TO EXERCISE SAME CARE FOR SAFETY OF PUBLIC AS THOSE USING PUBLIC STREETS. — The same duty to exercise care for the safety of the public and of all persons having occasion to use public piers is due from those in control of such piers as from those using public streets, since both are public ways.

JUDGMENT OF CIRCUIT COURT OF UNITED STATES, EFFECT TO BE GIVEN TO, IN STATE COURTS. — State courts must give the same force and effect to a final judgment of the circuit court of the United States that they give to the judgments of the courts of their own state, and this, although had the action been brought in the state court, no judgment could have been recovered therein.

JUDGMENT FOR DAMAGES FOR NEGLIGENCE, HOW FAR CONCLUSIVE IN ACTION TO RECOVER AMOUNT PAID PURSUANT THERETO. — In an action brought to recover the amount which the plaintiff has been compelled by the judgment of a court having jurisdiction to pay for the alleged negligence of the defendant, the judgment in the first action is proof, in the second action, of the liability, and the amount thereof, of the defendant in the first action to the plaintiff therein, where notice of that action and an opportunity to defend it were given to the wrong-doer, but it is not conclusive evidence of the liability of the defendant in the second action to the defendant in the first action. Such liability must be established by evidence outside of the record in the first action.

THIS is an appeal from a judgment denying the plaintiff's motion for a new trial, and dismissing its complaint. The plaintiff is a British and the defendant a Spanish corporation. The department of docks of the city of New York, by an instrument in writing, for convenience called a lease, granted to the plaintiff the wharfage of piers 44 and 45, on the North River. This instrument contained the following provisions: "And the said parties of the first part hereby authorize the said party of the second part to enter upon the said premises and take possession of the same, at the time herein designated and for the purpose herein set forth, and to hold and enjoy the same, subject, however, to all ordinances of the mayor, aldermen, and commonalty of the city of New York now in

force, or which may hereafter be adopted by the said mayor, aldermen, and commonalty of the city of New York, and all laws of the state of New York which are now in force or which may be hereafter enacted, in any way appertaining or relating thereto. . . . And the said party of the second part, for itself, its successors and assigns, agrees to erect on each of said piers, Nos. 44 and 45, under the supervision of the said department of docks, and in conformity with the fire laws of the city of New York, and in accordance with plans to be filed in and approved by said department, suitable sheds for the protection of merchandise and freight." The plaintiff sublet pier 44 to the defendant. While in possession of this pier, the defendant permitted the *Louis Baker* to receive its cargo at it. John Cleary was employed in loading the vessel, and while he was engaged in hoisting freight on board, a sliding door in the shed on this pier fell upon him and broke his right leg. Cleary brought an action in the circuit court of the United States against the Oceanic Steam Navigation Company, alleging that it was lessee of pier 44, having possession and control thereof at the time of the accident, and that the door fell upon him by reason of the carelessness and negligence of the defendant in failing and omitting to have said door properly secured. The answer denied negligence, and alleged that the pier was in the possession of a sublessee at the time of the accident. The Spanish corporation had notice of Cleary's action, but did not defend it. The British corporation made defense, but judgment went against it for \$2,084.05 damages and costs. A motion for a new trial was denied. As the amount of the judgment was not sufficient to authorize an appeal of the supreme court of the United States, the judgment was final, and had to be paid. In defending the action the sum of \$784.12 was necessarily expended, and this action was brought to recover those two sums, with interest.

Laurence Godkin, for the appellant.

James S. Stearns, for the respondent.

FOLLETT, C. J. Had Cleary's judgment been recovered in a court in this state and affirmed by a court of last resort, the right of the Oceanic Steam Navigation Company (assuming that its negligence did not contribute to the accident) to recover the sums it had been compelled to pay by the judgment would hardly be questioned. There are many reported cases

of recoveries of sums which persons have been compelled by judgments to pay for the neglects of others, and the general rule is, that there may be a recovery had in such cases, unless the parties concurred in the wrong which caused the damages: *Rochester v. Montgomery*, 72 N. Y. 67; *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Chicago City v. Robbins*, 2 Black, 418; 4 Wall. 657; *Lowell v. Boston etc. R. R. Co.*, 23 Pick. 24; 34 Am. Dec. 33.

The foregoing cases were brought by cities to recover sums which they had been compelled to pay to travelers on the streets for injuries caused by the negligent conduct of the defendants. In those cases the liability of the defendants to indemnify the municipalities is not placed on the ground that persons causing injuries in highways owe a higher or different duty to the public or to a city than to individuals, nor upon the ground that the liability over is peculiar to neglects to use due care in public streets. The same duty to exercise care for the safety of the public and all having occasion to use piers would seem to be due from those in control of public piers as from those using a public street, for both are public ways: *Radway v. Briggs*, 37 N. Y. 256; *Taylor v. Atlantic Mut. Ins. Co.*, 37 N. Y. 275; *In re New York Cent. etc. R. R. Co.*, 77 N. Y. 257; *Taylor v. Mayor etc.*, 4 E. D. Smith, 559; *Mayor etc. v. Rice*, 4 E. D. Smith, 604; *People v. Baltimore etc. R. R. Co.* 50 Hun, 192; 117 N. Y. 152-157; *People v. Mallory*, 46 How. Pr. 281-283; 2 Thomp. & C. 76; *People v. Macy*, 62 How. Pr. 65; *Gluck v. Ridgewood Ice Co.*, 9 N. Y. Supp. 254.

In *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324, the defendant fastened a telegraph wire to the plaintiff's chimney without having obtained permission. The weight of the wire pulled the chimney into the street, injuring a traveler, who began an action to recover his damages against the owner of the building. Notice of the suit was given to the gas-light company, but it refused to defend. Subsequently, Gray, the owner of the building, paid the traveler \$335 for his damages and in settlement of the action, and then sued the gas-light company to recover that sum and the expenses of the litigation. It was held, the sum paid in settlement having been found to be reasonable, that it and the expenses of the action could be recovered. The court, in discussing the question, said: "When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution

from the other, because both are equally culpable, or *particeps criminis*, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable."

In *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355, a judgment had been recovered against the occupant of a building for damages sustained by a traveler who had fallen through a hatchway in a sidewalk. The owner paid the judgment, and sought to recover the amount of it from Holt, alleging that his servant, in the course of his business, opened and negligently left the hatchway uncovered, and so caused the accident. On the trial the evidence to prove this allegation was rejected, but it was held on review that it was competent. It was said: "The rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity or contribution does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability. In such case the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable."

In that case, as in the one at bar, the defendant took the position that the judgment in favor of the traveler against the owner was conclusive against his right to maintain the action. This position was not sustained, and in discussing the question the court said: "Under the pleadings in that suit the judgment may have been rendered upon the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *particeps criminis* with the defendants, and is not inconsistent with their right to maintain this action." This case was retried, and the jury found that the parties were joint tort-feasors, and the plaintiff was defeated: *Churchill v. Holt*, 131 Mass. 67; 41 Am. Rep. 191. The principle was again asserted in *Simpson v. Mercer*, 144 Mass. 413; *Old Colony R. R. Co. v. Slavens*, 148 Mass. 363; 12 Am. St. Rep. 558.

In *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y.

475, 487, 7 Am. Rep. 469, the rule of liability was thus stated: "Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators." This was said in an action founded upon a covenant to keep the street upon which the accident occurred in repair, but reference was made to *Lowell v. Boston etc. R. R. Co.*, 23 Pick. 24, 34 Am. Dec. 33, a leading case, laying down the rule that where one has been compelled, by a judgment, to pay the damages occasioned by another's negligence, the amount paid may be recovered against the principal wrong-doer, though contractual relations do not exist between the parties to either action. See also Bishop on Non-Contract Law, sec. 535.

When damages have been recovered by a judgment against a master for injuries sustained by a servant's negligence, the master not having contributed, the sum so paid by the latter may be recovered from the servant: *Smith v. Foran*, 43 Conn. 244; 21 Am. Rep. 647; *Grand Trunk R'y Co. v. Latham*, 63 Me. 177; *Green v. New River Co.*, 4 Term Rep. 589; *Pritchard v. Hitchcock*, 6 Man. & G. 154; Smith on Master and Servant, 134; 2 Thompson on Negligence, 1061; Wharton on Negligence, sec. 246.

Sufficient cases have been cited to show that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter, no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence; and if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrong-doer, they may be recovered from him.

For the purpose of this discussion it will be assumed that had Cleary brought his action against the Oceanic Steam Navigation Company in the courts of this state, he would have failed. This brings us to the question of the effect of the judgment of the circuit court of the United States. These companies are foreign corporations, and Cleary was a resident citizen of this state, which gave the circuit court jurisdiction of the action: U. S. Const., art. 3, sec. 2. The courts of this

state also had jurisdiction to determine the controversy between Cleary and the Oceanic Steam Navigation Company. In other words, the circuit court of the United States and the courts of this state had concurrent jurisdiction to determine whether this corporation was liable to Cleary by reason of the accident, and the adjudication of either court would have been conclusive upon the other. The judgment of the circuit court of the United States must be given the same force and effect by the courts of this state as we give to the judgments of our own courts: *Crescent City Live Stock Co. v. Butchers' Union*, 120 U. S. 141; 2 Black on Judgments, sec. 938.

In the case cited, the court said: "And their [the judges of the circuit court] judgment or decree when rendered is binding and perfect between the parties until reversed, without regard to any adverse opinion or judgment of any other court of merely concurrent jurisdiction. Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. While it remains in force, it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate."

What effect would the courts of this state give to a judgment rendered by one of them for damages arising from negligence, in an action brought to recover the amount paid pursuant to the judgment?

The defendant in the action would not be bound by the judgment as a party, for he was not a defendant in the first action; but had he been joined as a defendant, and both had been adjudged liable, the judgment would not necessarily have determined, as between them, whether either was or was not primarily liable, because that question could not have been litigated in the first action, at least it could not have been without the consent of all the parties to it, and of the trial court, and then only through the aid of a special verdict or of a special finding. The judgment in an action first brought is proof in the second action of the liability, and the amount thereof, of the defendant in the first action, to the plaintiff therein. The liability of the defendant in the second action to the defendant in the first (the plaintiff in the second) must be established by evidence outside of the record of

the first action. Such would have been the conceded effect of Cleary's judgment, had it been recovered in a court of this state. In the case at bar, the judgment of the circuit court is not conclusive evidence of the liability of the defendant to the plaintiff, nor would it have been, had both been defendants in that judgment. But until it is impeached as fraudulent, or as rendered by a court without jurisdiction, it is proof that the plaintiff in this action was legally liable to Cleary for the damages occasioned by the accident, and of the amount of that liability. When we give the judgment of the circuit court that effect, we give it the same force and effect as we give to a judgment of our own courts. When the plaintiff had shown that he gave due notice of the pendency of the first action, that he had contested it so far as he could, and had finally paid the judgment rendered, he had shown the amount of the damages which he had sustained, aside from the expenses incurred in its defense. Whether, as between these litigants, the defendant is primarily liable for the damages occasioned by the injury to Cleary must be determined by evidence outside of the record in the United States circuit court.

The record of the first action, when put in evidence in the second action by a plaintiff, might disclose a state of facts showing that he was solely liable for the injury, or that the defendant in the second action was not liable over to him, but such facts do not appear from the record in Cleary's case, and the report of the reasons for the denial of the motion for a new trial shows that the circuit court did not rest its judgment on the theory that such facts were established. The court said: "There was sufficient in the evidence to warrant the jury in finding that the door or its fastenings was in a condition of disrepair for a period long enough to justify the imputation of negligence. The fact, which was quite clearly shown, that the door and fastening were in good repair when the defendant assigned to the Spanish-American company the right to collect wharfage and cranage at the pier did not relieve the defendant from its duty to keep the wharf in safe condition": *Cleary v. Oceanic Steam Nav. Co.*, 40 Fed. Rep. 908.

Whether the courts of a state have given the same force and effect to a judgment of a federal court that they do to that of their own, is a question which may be reviewed by the supreme court of the United States: *Crescent City Live Stock Co. v. Butchers' Union*, 120 U. S. 141.

The fact that certain classes of litigants in the United States are subject to two judicial systems, the courts of which sometimes differ in their views of the rights and liabilities of persons, without having in most cases an ultimate arbiter to decide as between them, is at least a peculiarity arising from our dual form of government which will become more and more apparent as time goes on and experience is acquired.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

PAYMENT — PARTY PAYING DAMAGES FOR NEGLIGENCE OF ANOTHER ENTITLED TO INDEMNITY. — Where parties are not in *pari delicto*, and one is compelled to pay damages, he may sue the other for contribution: *Lowell v. Lowell etc. R. R. Corp.*, 28 Pick. 24; 34 Am. Dec. 83, and note. Where one person is subjected by legal process to pay money which another is bound by law to pay, it cannot be required that the former shall have exhausted every possible means of litigation in resisting the payment before he shall be entitled to his action for the money paid: *Winchester v. Beardin*, 10 Humph. 247; 51 Am. Dec. 702, and note. For a discussion of contribution in favor of a joint tort-feasor who has been compelled to pay for the negligence of another, see extended note to *Cartersville v. Cook*, 16 Am. St. Rep. 250-255, and numerous cases cited in the opinion. A master can recover from a servant for whose negligence the master has been obliged to pay damages, where the master has been without fault: *Smith v. Foran*, 43 Conn. 244; 21 Am. Rep. 647.

WHARVES — LIABILITY OF OWNER FOR INJURIES CAUSED BY IMPROPER CONDITION OF. — Where a customs officer, in the discharge of his duty, fell through an unguarded opening in a wharf and was injured, it was held that he could recover damages therefor: *Low v. Grand Trunk R'y Co.*, 72 Me. 313; 39 Am. Rep. 331, and note. The occupant or lessee of a dock or pier to which vessels are made fast for the purpose of receiving and discharging freight and passengers must keep the same in a reasonably safe condition for carrying on such business: *Newall v. Bartlett*, 114 N. Y. 399; *Vroman v. Rogers*, 132 N. Y. 167; *Philadelphia etc. R. R. Co. v. Errin*, 89 Pa. St. 71; 33 Am. Rep. 726. See also the case of *Willey v. Allegheny City*, 118 Pa. St. 490, 4 Am. St. Rep. 608, in which the degree of care that wharf-owners must exercise is discussed.

COURTS, FEDERAL — CIRCUIT COURT — CONCLUSIVENESS OF JUDGMENTS OF. — The circuit court of the United States is entitled to as much respect as a court of a sister state, and within the limits prescribed to it has a jurisdiction as uncontrolled as that of any court whatever: *St. Albans v. Bush*, 4 Vt. 58; 23 Am. Dec. 246. A state court cannot lawfully interfere with the execution of final process of a federal court for the protection of a stranger claiming that his property has been wrongfully seized in execution to satisfy the debt of another: *Munson v. Harroun*, 34 Ill. 422; 85 Am. Dec. 316, and note. Circuit courts of the United States are endowed with such original and general jurisdiction as to entitle them to the benefit of all legal intendment necessary to support their acts until reversed or annulled by a superior tribunal: *Byers v. Fowler*, 12 Ark. 218; 54 Am. Dec. 271, and note.

HAMILTON NATIONAL BANK v. HALSTEAD.

[134 NEW YORK, 520.]

FRAUDULENT TRANSFER OF ENCUMBERED PROPERTY, CREDITORS ENTITLED TO RECOVER ONLY VALUE OF INTEREST TRANSFERRED. — When personal property pledged to secure the payment of a valid debt is fraudulently transferred by the owner, his creditors are not, upon the setting aside of the transfer, entitled to recover from the fraudulent transferee the full value of the property, but only its value after deducting the amount of the debt. And however scandalous the fraud may be, a court of equity cannot, by way of punishment for his participation in the fraud, award judgment against him for a sum exceeding that value.

CREDITORS NOT LIMITED TO PRICE RECEIVED BY FRAUDULENT TRANSFEREE WHEN. — Where property fraudulently transferred is sold by the fraudulent transferee for less than its value, the creditors of the transferrer are not limited in their recovery to the amount received for the property, but may recover its full value at the time of the transfer.

ACTION to set aside a fraudulent transfer. The opinion states the case.

George M. Pinney, Jr., for the appellants.

William Hildreth Field, for the respondents.

PARKER, J. The judgment, among other things, adjudged that a transfer of certain securities made by William M. Halstead to Richard H. Halstead, on the eleventh day of July, 1884, was fraudulent and void as against the creditors of William M. Halstead individually, and the firm of Halstead, Haines, & Co., of which William M. Halstead was a member.

Some time prior to the date mentioned, William M. Halstead, the owner of the securities, hypothecated them with the New York Life Insurance and Trust Company to secure a loan made by it to Halstead of sixty-five thousand dollars.

Halstead paid the amount thus received into the firm of Halstead, Haines, & Co.

Subsequently, the firm of Halstead, Haines, & Co., and the individual members thereof, being about to make a general assignment for the benefit of creditors, William M. Halstead, without any actual consideration, transferred the securities so pledged to his son, Richard H. Halstead. Upon the transfer, Richard H. gave to William M. his check for sixty-five thousand dollars, which was indorsed by him, and then returned to Richard H., who delivered the check, together with an order, to the trust company. It canceled the loan, made delivery of the securities, and they were then rehypothecated with

the same company for said sum of sixty-five thousand dollars. No money was paid to either William M. or the trust company. Richard H. having acquired the title to the stock, an arrangement was made, which, in effect, operated to substitute Richard H. in the place of William M. as the debtor to the trust company. This was accomplished by canceling the old loan and making a new one for the same amount, with a re-hypothecation of the same securities.

As between William M. and Richard H., the effect of the transaction was to transfer the securities charged with the payment of the loan which it was originally pledged to secure.

He afterwards received from dividends and sales of the stock seventy-six thousand five hundred dollars, leaving in his hands eleven thousand five hundred dollars after payment of the loan. This sum, with interest, he was by the judgment directed to pay to the plaintiffs, who were judgment creditors of William M. Halstead.

The appellant urges upon this appeal that judgment should have been rendered against him for the full amount of seventy-six thousand five hundred dollars; that having been a party to a fraud, a court of equity will charge him with the full value of the stock, notwithstanding the larger portion of it was required to pay a valid debt, which it had been pledged to secure prior to the transfer to a party in no wise connected with the fraud. It is said that this will be done by a court of equity, by way of punishment for his participation in the fraud.

While it is true that cases abound where the courts, in an action to set aside a deed or transfer of personal property on the ground of fraud, have refused to allow the fraudulent grantee or transferee to be reimbursed the money actually paid as a consideration for the conveyance or transfer, and in the course of discussion have treated the refusal of the court to allow any reimbursement whatever as a proper punishment for the fraud, it has never been assumed, so far as we have observed, that the refusal to allow reimbursement for moneys paid was based on the right of a court of equity to punish the party because of his wrong-doing. The effect of the decisions may have been to punish quite severely the fraudulent grantee or transferee, but the courts did not have the power to deprive him of one dollar because they deemed him deserving punishment.

If a fraudulent transferee sell the property before the com-

mencement of the action to set aside the transfer, a judgment for the value of the interests transferred to him may be recovered, but, however scandalous the fraud may be, the court is powerless to award judgment against him for a sum exceeding such value.

Other tribunals than courts of equity administer the law, which has for its object the punishment of the guilty.

If A convey to B his farm worth five thousand dollars, with intent to defraud his creditors, B paying him one thousand dollars at the time of the delivery of the deed, the court, in the decree setting aside the conveyance, will refuse to grant him relief, not as a proper punishment for the offense, but because the creditors have an equity equal to the value of the property granted, which should be fully protected as against him who fraudulently sought to despoil it. But for the conveyance, the entire property would have been applicable to the payment of the creditors. By the fraud it was put beyond the reach of an execution. Because of it, a court of equity declares the deed void. And to the request of B that he be allowed the one thousand dollars paid to his fraudulent grantor, a court of equity refuses to listen, because the equity of the creditors embraces the whole of the property, including necessarily the interest represented by the one thousand dollars paid to A, and it cannot be cut down or interfered with by any payment constituting a part of the fraudulent transaction. But for the misconduct of B, the creditors presumably could have reached the entire interest; therefore, the result of it must be borne by him, and not by the innocent party.

Should A convey his farm to B, subject to a valid pre-existing mortgage of five thousand dollars held by a third party, and B subsequently dispose of it for a larger sum, out of the proceeds of which he pays the mortgage, he cannot be required to pay to the creditors the full value of the farm without deducting the amount due on the mortgage; for as to that sum the creditors have no equity. If the fraud had not been consummated, only the value of the property in excess of the mortgage could have been made available in payment of the claims of the creditors. As to that interest secured by the mortgage, no wrong was done them. Having no right to such interest, no principle of equity exists on which to found a claim for an appropriation of any benefit, on account of it, from a fraudulent grantee of the equity of redemption.

Or if, before B sells the property, the conveyance is set

aside on the ground of fraud in an accounting for the rents and profits, he will be allowed for interest paid on the mortgage, and for the reason that, the mortgage being valid, the property was chargeable with the payment of the interest as well as the principal, and the creditors were not therefore harmed by it. This question was carefully considered and passed on in *Loos v. Wilkinson*, 113 N. Y. 485, 10 Am. St. Rep. 495, the court saying: "Shall he account to the creditors for more rents than they could have received if they had had possession of the real estate? When the creditors of the grantor come into a court of equity seeking to compel him to account for rents and profits, the accounting must be on equitable principles; and when he has been compelled to surrender the property conveyed to him, and to account for all the profits he has made, or could have made, or ought to have made, therefrom, the ends of justice have been completely and exactly attained." In the same case, the fraudulent grantee was allowed for taxes paid, the court saying: "They were imposed by supreme authority for the benefit of the public, and were inevitable. If the creditors had taken the property at the time John Wilkinson took it, they would have been obliged to pay them. By the payment he did them no wrong and caused them no prejudice. Why should he not be allowed them? Upon what principle of equity, or upon what ground of reason, or public policy, or justice, can he be compelled to allow for the gross rents, without any deduction whatever for the taxes which he was obliged to pay?"

The principle underlying the decision in *Loos v. Wilkinson*, 113 N. Y. 485, 10 Am. St. Rep. 495, is exactly applicable and decisive here. As to the sixty-five thousand dollars paid out of the proceeds of the sale in extinguishment of a debt originally created by William M. Halstead, these plaintiffs were not harmed. If the transfer had never been made, and the securities had been obtained by them, they would have been subject to the payment of this valid pre-existing debt. It was created in good faith. The proceeds were turned over to the firm of Halstead, Haines, & Co. And if appellant's contention could prevail, then the creditors would, in effect, recover the sixty-five thousand dollars twice,—once through the assets of the firm into which the sum borrowed originally went, and the second time from the fraudulent transferee; the latter being obliged to pay for an interest which he did not receive, and to which the creditors would have never become entitled

had the transfer not been made. In the language of Judge Earl in *Loos v. Wilkinson*, 113 N. Y. 485, 10 Am. St. Rep. 495, this "would be spoliation, not justice or equity."

The authorities so carefully selected and skillfully presented by the counsel for the appellant we do not regard as conflicting with the views so far expressed. In *Smith v. White*, 7 N. Y. Supp. 373, a general assignment was declared fraudulent, and on the accounting the assignee, because of his being a party to the fraud vitiating the assignment, was not allowed moneys disbursed in the payment of preferences, as provided by the assignment.

In *Wood v. Hunt*, 38 Barb. 302, the fraudulent grantee, subsequent to the conveyance to him, voluntarily paid the demands which certain creditors of the grantor had against him, and in the judgment declaring the deed fraudulent and void, reimbursement for such sums was refused him.

In *Union Nat. Bank v. Warner*, 12 Hun, 306, the fraudulent grantee had assumed the payment of certain debts which the grantor undertook to charge on the real estate by the instrument of conveyance. The deed was adjudged void, and allowance for the obligations assumed denied.

In *Davis v. Leopold*, 87 N. Y. 622, the fraudulent grantee assumed the payment of a pre-existing mortgage, and on review of the judgment setting aside the deed, this court said: "If it was true, under the findings, that Mrs. Leopold was entitled to protection for the sum paid or the liability assumed, it would indeed be necessary to state the amount. But she was a guilty participant in the fraud, and not to be cared for." It does not appear from the report of the case, however, that the grantee had paid the mortgage, or that it did not still continue to be a lien on the premises. The answer denied fraud, and alleged a consideration. It averred that the conveyance was in payment and satisfaction of a debt due from the husband, and her agreement to pay certain mortgages and encumbrances upon the property.

Whatever she had agreed to pay for the property, whether in money or by way of assuming the payment of valid encumbrances, formed a part of the fraudulent transaction, and in an action to set aside the conveyance the court would leave the parties in the position in which they placed themselves. If the mortgage still continued in force, as we may assume it did, the judgment setting aside the conveyance did not affect its validity, nor the right of the mortgagee to enforce its col-

lection out of the property. The assumption of its payment by the fraudulent grantee was a burden assumed in her own wrong, the consequences of which the court would not attempt to shield her from.

A very different question would have been presented had the plaintiffs demanded judgment that she be decreed to pay the mortgage; or had the property been previously sold, that judgment be awarded against her for the full value of the premises, and without deducting therefrom the amount secured by the mortgage.

In *Borland v. Walker*, 7 Ala. 269, the grantee agreed to pay certain specified but unsecured debts of the grantor, and to pay the balance of the purchase price in installments. The conveyance was set aside, and the grantee refused indemnity for the sums expended.

It will be observed that in the cases cited, with the exception of *Davis v. Leopold*, 87 N. Y. 622, to which we have sufficiently alluded, the question was whether a fraudulent grantee could be reimbursed for moneys paid, or agreed to be paid, as a part of the fraudulent transaction. To that question but one answer is ever given. The equity of the creditors extends to the full value of the debtor's interest in the property at the time of the fraudulent conveyance, and the fraudulent grantee cannot be allowed to cut down or interfere with the interest to which such equity attaches.

But quite a different question is presented where, as here, the creditors undertake to compel the fraudulent grantee or transferee to respond to them for an interest in property which he did not seek to get, and which his grantor or vendor did not have to convey or transfer to him.

In such a case the plaintiffs are without any equity on which to base a right of recovery.

The trial court found that on the day of the transfer the securities were worth five hundred dollars more than the defendant subsequently realized for them, but a recovery was only allowed for the sum received.

We think the judgment should have been for their value. The defendant wrongfully acquired title to the securities, and if he parted with them for less than they were worth, the loss should fall on him.

The judgment should be modified accordingly, and, as modified, affirmed, with costs to the appellant.

FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS — AMOUNT OF RECOVERY. — The rights of a creditor cannot be defeated by a fraudulent mortgage by selling the mortgaged premises: *Manderille v. Avery*, 124 N. Y. 376; 21 Am. St. Rep. 678. A judgment recovered subsequently to a fraudulent conveyance, and based upon an indebtedness contracted partly prior and partly subsequent thereto, is a lien upon the property of the judgment debtor only to the extent of the indebtedness contracted prior to the fraudulent conveyance: *Henderson v. Henderson*, 133 Pa. St. 399; 19 Am. St. Rep. 650. A conveyance fraudulent as to existing creditors is not void as to subsequent creditors, where the statute provides that such conveyance shall be void only as to such as are defrauded; it operates to transfer the title to the property subject to the encumbrance of the grantor's existing debts: *Bullitt v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412. Where the whole value of a homestead conveyed by a husband to his wife was forty thousand dollars, and it contained land, in excess of the exemption amount, worth five thousand dollars, and the husband was worth seventy-five thousand dollars over and above his debts at the time of the conveyance, the conveyance was not fraudulent as to his subsequent creditors: *Pike v. Miles*, 23 Wis. 164; 99 Am. Dec. 148. The value of property included in an alleged fraudulent conveyance is a material subject of inquiry: *Weadock v. Kennedy*, 80 Wis. 442. See also the case of *Redfield v. Hewes*, 67 Miss. 479.

MITCHELL v. THORNE.

[124 NEW YORK, 586.]

DEMURRER ON GROUND OF DEFECT OF PARTIES MUST SPECIFICALLY POINT OUT PARTICULAR DEFECT. — When a demurrer to a complaint is based on the ground that there is a defect of parties plaintiff or defendant, the particular defect relied on must be pointed out specifically.

DEMURRER TO COMPLAINT INTERPOSABLE ONLY FOR OBJECTIONS APPEARING ON ITS FACE. — A demurrer to a complaint can be interposed only for objections appearing on its face. Where, therefore, a plaintiff sues as heir of a deceased person, a demurrer to the complaint on the ground that other heirs are not made parties cannot be sustained, unless it appears from the complaint that there are other heirs.

MONUMENT AT GRAVE OF DECEDENT, ACTION BY HEIRS FOR INJURY TO OR REMOVAL OF. — The heirs of a decedent, at whose grave a monument has been erected, or the person who rightfully erected it, can recover damages from one who wrongfully injures or removes it, or by an injunction may restrain one who, without right, threatens to injure or remove it, even though the title to the ground wherein the grave is be not in the plaintiff, but in another.

COMPLAINT IN ACTION TO RESTRAIN SPOILIATION OF BURIAL-PLACE, SUFFICIENCY OF. — A complaint in an action to restrain the defendant from removing grave-stones and interfering with a family burial-ground, which alleges that the father of the plaintiffs, together with his brothers and sisters, owned, as tenants in common, the farm upon which said family burial-ground is laid out, wherein the ancestors and collateral relatives of the plaintiffs had from time to time been buried, and their graves marked by mounds and memorial stones; that said co-tenants

conveyed said farm to the person from whom the defendant deraigns her title, "excepting and reserving the right of interment" in said lot, "and also a right of way to the same, to all the grantors of this deed, and to their heir or heirs forever"; that the father of plaintiffs and all the grantors in said deed are now dead, and said reserved right of family burial has descended to the plaintiffs as heirs at law of the grantors in said deed; that the defendant holds the farm subject to said reservation and exception; and that she has removed a part of the fence inclosing the burial-ground, destroyed some of the grave-stones marking the graves of the ancestors and relatives of the plaintiffs, graded away the mounds of the graves and obliterated all traces of them, and refuses a right of way to the plaintiffs to and from said ground, and threatens, by grading and leveling, to destroy it as a burial-place,—states facts sufficient to constitute a cause of action.

THE facts are stated in the opinion.

John M. Perry, for the appellant.

A. N. Weller, for the respondents.

FOLLETT, C. J. It is alleged in the complaint that the father of the plaintiffs, together with his brothers and sisters, owned as tenants in common a farm of two hundred acres, a small portion of which had been laid out and inclosed as a family burial-ground, wherein the ancestors and collateral relatives of the plaintiffs have been buried from time to time, and their graves marked by the usual mounds and appropriate memorial stones.

It is further alleged that these tenants conveyed the farm to R. V. W. Thorne by a deed which contains the following language: "Excepting and reserving the right of interment in the ground laid off for that purpose in the land hereby conveyed, and also a right of way to the same, to all the grantors of this deed, and to their heir or heirs forever."

It is further alleged "that plaintiff's said father and all the grantors in said deed to the said R. V. W. Thorne are now deceased, and the easement or right of family interment or burial reserved in said farm or land has descended to plaintiffs as heirs at law of the grantors in said deed."

It is also averred that the defendant is the owner and in possession of the farm, subject to said reservation and exception under mesne conveyances, deriving her title ultimately from said R. V. W. Thorne, and that she has removed a part of the fence inclosing the burial-ground, destroyed some of the grave-stones marking the graves of the ancestors and relatives of the plaintiffs, graded away the mounds of the graves,

and obliterated all traces of them, and refuses a right of way to the plaintiffs to and from said ground, and threatens, by grading and leveling it, to destroy said burial-place.

The plaintiffs demand a judgment restraining the defendant from removing the grave-stones, grading the grounds, destroying and obliterating the graves, and also for damages.

To this complaint the defendant demurred on the grounds, — 1. That the complaint does not state facts sufficient to constitute a cause of action; 2. That there is a defect of parties, because it is not alleged that all of the heirs of all the grantors, in whose favor the reservation hereinbefore mentioned was made, are plaintiffs or defendants.

The second ground of demurrer, requiring but little consideration, may well be first determined.

When a demurrer to a complaint is based on the sixth ground specified in section 488 of the Code of Civil Procedure, "that there is a defect in parties plaintiff or defendant," the particular defect relied on must be pointed out specifically by the demurrer: Code Civ. Proc., sec. 490; *Dodge v. Colby*, 108 N. Y. 445; Story's Equity Pleading, secs. 236, 238, 543. The only defect under this subdivision pointed out by the demurrer is: "That the heirs at law of the father of the plaintiffs and of the other grantors in the deed to R. V. W. Thorne, mentioned in the complaint, are not, except the plaintiffs herein themselves, made parties plaintiff nor parties defendant." The answer to this ground of demurrer is, that it does not appear on the face of the complaint that the father of the plaintiffs and his brothers and sisters, or any one of them, left heirs other than the plaintiffs. A demurrer to a complaint can be interposed only for objections appearing on its face: Code Civ. Proc., sec. 488; *Haines v. Hollister*, 64 N. Y. 1; Story's Equity Pleading, secs. 226, 238, 543.

The first ground of demurrer remains to be considered. It has been decided many times, and frequently asserted by text-writers, that the heirs of a decedent, at whose grave a monument has been erected, or the person who rightfully erected it, can recover damages from one who wrongfully injures or removes it, or by an injunction may restrain one who, without right, threatens to injure or remove it, and this, though the title to the ground wherein the grave is be not in the plaintiff, but in another: *Frances v. Ley*, Cro. Jac. 366; *Corven v. Pym*, 12 Rep. 105; *Spooner v. Brewster*, 10 Moore, 494; 3 Bing. 136; 2 Car. & P. 34; *Matter of Brick Presbyterian Church*, 8

Edw. Ch. 155-168; *Matthews v. Jeffrey*, L. R. 6 Q. B. D. 290; *Pierce v. Swan Point Cemetery*, 10 R. I. 227; 14 Am. Rep. 667; *Beatty v. Kurtz*, 2 Pet. 566; *Snyder v. Snyder*, 60 How. Pr. 368; 1 Rolle Abr. 625; 4 Bac. Abr., tit. Heir and Ancestor, 163; 2 Com. Dig., tit. Cemetery, 305; 1 Co. Lit. 18 b; 3 Coke Inst. 202 et seq.; 2 Bla. Com. 428; 2 Stephen's Com., 8th ed., 220; 1 Williams on Executors, 7th Am. ed., 792; Ferard on Fixtures, 202.

But this rule of law is not quite applicable to this case as stated in the complaint; for it is not alleged that the plaintiffs are the heirs of any of the persons whose graves or monuments have been destroyed, nor is it averred that they are heirs of any of the persons buried in that yard.

The word "ancestor" is an ambiguous one, broad enough to include, but not necessarily including, parents, grandparents, and all persons in the ascending line, as far as relationship can be traced. "Descendant" is an antonym of "ancestor," but is not a synonym of "heir." It is plain that the allegation that the ancestors of the plaintiffs are buried in this yard is not equivalent to an allegation that the plaintiffs' parents were there buried, or that the plaintiffs are the heirs of the persons there buried. No one is the heir of all of his ancestors.

The rights of the heirs of the grantors to protect the graves and monuments in the ground reserved are not to be solely ascertained and limited by the rules defining the rights of heirs of persons buried in church-yards and incorporated cemeteries, but must be ascertained from the words of the clause in the deed, aided by the general rules relating to burial-places.

The right of the tenants in common, and of their heirs, is called in the grant an "exception" and a "reservation," the scrivener not seeming to have understood that the words as used are inconsistent. By an exception some portion of the subject of the grant is excluded from the conveyance, and the title to the part so excepted remains in the grantor by virtue of his original title. A reservation creates a new right out of the subject of the grant, and is originated by the conveyance: *Stockwell v. Couillard*, 129 Mass. 231; *Langdon v. Mayor etc.*, 6 Abb. N. C. 314; 1 Washburn on Real Property, 4th ed., 432; 1 Dart on Vendors and Purchasers, 6th ed., 612.

It is recited that ground had then been laid off for interments, and a right of way to and from this ground, with the

right to bury therein, is "excepted" and "reserved" to the grantors, and their heirs forever. The right to bury carries with it the right to do so according to the usual custom in the neighborhood, and undoubtedly includes the right of making mounds over and erecting stones and monuments at the graves. The right to make such erections would carry with it the right to protect them from spoliation. The language assumes the existence of a burial-ground, and the grantors had the right to protect the graves and monuments which existed at the date of the grant, or which were made during their lives, and their heirs, having succeeded to their rights, may protect the graves and monuments now existing.

It is urged that the allegation that the plaintiffs are the children of one of the heirs of the tenants in common, all of whom are alleged to be dead, is not sufficient to show that they have succeeded to the title, because, — 1. It is not alleged that their father and his co-tenants (plaintiff's uncles and aunts) died intestate; 2. It is not alleged that the uncles and aunts left no ancestors, descendants, or collateral relatives entitled to take as heirs before or with the plaintiffs.

An allegation that A died seised of certain realty, leaving B, C, and D, his children, is a sufficient allegation of title; and if established by evidence, makes a *prima facie* case of ownership of the realty by the three children. As to realty, intestacy, not testacy, is presumed: *Duke of Cumberland v. Graves*, 9 Barb. 596-606; *Delafield v. Parish*, 25 N. Y. 9-35; *Baxter v. Bradbury*, 20 Me. 260; 37 Am. Dec. 49; *Lyon v. Kain*, 86 Ill. 368; 3 Washburn on Real Property, 4th ed., 18; Abbott's Trial Evidence, 109.

That the plaintiffs are the heirs of their father, one of the tenants in common, is sufficiently alleged, but sufficient facts are not alleged to establish their title by heirship to the interest in the burial-place of which their uncles and aunts died seised. To show the heirship of a claimant, he must prove his descent from the person last seised, when he claims as lineal heir, or the descent of himself and the person last seised, from some common ancestor, or at least from two brothers or sisters. If he claims collaterally, he must establish the extinction of all those lines of descent which would be entitled to succeed before him: *Emerson v. White*, 29 N. H. 482; *Richards v. Richards*, 15 East, 294; *Roe v. Lord*, 2 W. Black. 1099; 1 Saunders's Pleading and Evidence, 457; 1 Chitty's General Practice, 276 et seq.; Adams on Ejectment,

4th Am. ed., 324; Tyler on Ejectment, 485; 3 Washburn on Real Property, 4th ed., 18; Abbott's Trial Evidence, 85.

The situation requires an answer to the question, whether the allegation that the plaintiffs have succeeded to the interest of their father is a sufficient averment of title to authorize them to maintain an action to restrain the destruction of the burial-ground, and the closing the way thereto, or to recover damages for the injuries committed without alleging that the plaintiffs have succeeded to the interests of all of the tenants in common.

If the facts stated in a complaint are sufficient to constitute a cause of action, whether legal or equitable, the complaint is not demurrable on the ground that it does not state sufficient facts, because the judgment demanded is inconsistent with the cause of action stated, nor because both legal and equitable relief are demanded when plaintiff is entitled to but one: *Emery v. Pease*, 20 N. Y. 62; *Williams v. Slots*, 70 N. Y. 601; *Wetmore v. Porter*, 92 N. Y. 76.

All of the rights of the heirs of the grantors in this yard are not individual ones, enjoyable and enforceable by each solely for his own benefit, but many of them are held in common by all of the heirs, and among them those so held are the right of way and the right to maintain the yard for the purpose for which it was laid out and to protect it from destruction. Any one or more of the persons interested in these rights held in common may maintain an action to prevent, by an injunction, the destruction or interruption of such rights: *Murray v. Hay*, 1 Barb. Ch. 59; 43 Am. Dec. 773; *Cadigan v. Brown*, 120 Mass. 493; Story's Equity Pleading, secs. 286 b, 537, 537 a.

It is not necessary that such an action be brought by one nor by all of the persons interested. The damages sustained by each of the plaintiffs, if any, cannot be recovered in this action, but if it shall appear on the trial that all of the heirs are parties plaintiff, any damages arising from an injury to their common interests may be recovered.

The judgment should be affirmed, with costs, and the defendant have leave to withdraw her demurrer and answer, upon payment of costs within twenty days.

PLEADING — DEMURRER ON GROUND OF DEFECT OF PARTIES. — Such defect must be specifically pointed out: *Dodge v. Colby*, 106 N. Y. 445.

PLEADING — DEMURRER TO COMPLAINT, WHEN INTERPOSABLE. — To make the statute of frauds available as a defense to be raised by a demurrer in

equity, the bill must show affirmatively that the contract or promise declared on was not in writing: *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46. To the same effect, see *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242. An adverse party may demur under the code system, if every fact essential to the claim or defense be not stated: *Green v. Palmer*, 15 Cal. 411; 76 Am. Dec. 492.

BURIAL RIGHTS — DAMAGES FOR INTERFERENCE WITH. — A widow has the right to the custody of the body of her deceased husband, for preservation, preparation, and burial, and may maintain an action against any one who mutilates or destroys it: *Larson v. Chase*, 47 Minn. 307; 28 Am. St. Rep. 370, and note. Tort in the nature of trespass *quare clausum* lies in favor of the grantee of a cemetery lot, against the superintendent of the cemetery, for disinterring and removing therefrom the remains of the plaintiff's child, and the circumstances which accompany the trespass may be shown either in aggravation or mitigation of damages: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759, and note. For an extended discussion of the rights and duties of relatives and others respecting the bodies of the dead, see note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 503.

AM. ST. REP., Vol. XXX. — 45

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

DUNN v. MELLON.

[147 PENNSYLVANIA STATE, 11.]

UNCONSTITUTIONAL STATUTE — LIABILITY FOR ACTS UNDER. — A city acting under authority of a statute afterwards declared unconstitutional is responsible for all damages sustained by its acts, but an officer or agent of a city who acts by its direction in the premises is not personally responsible, and the same rule applies to a citizen who acts as the mere representative of such officer in the performance of a duty which apparently and by color of law rests upon him as a citizen, and which would necessarily be performed by the officer without any personal liability if the citizen refused to obey the mandate of the officer.

UNCONSTITUTIONAL STATUTE — LIABILITY FOR ACTS UNDER. — A citizen subject to the duty of obeying, and who does obey and execute, the mandatory order of a city passed by it by virtue of a statute afterwards declared unconstitutional, is not personally liable in damages for the result of his act. In such case, however, the city is liable.

TRESPASS by M. J. Dunn against Mellon Brothers to recover damages for the eviction of the plaintiff from a dwelling-house situated on Kirkwood Street, in the city of Pittsburgh, owned by Mellon Brothers, and by them leased to said Dunn. The remaining facts are stated in the opinion. Judgment for plaintiff. The defendants appealed.

J. McF. Carpenter, for the appellants.

F. C. McGirr and W. D. Moore, for the appellees.

GREEN, J. It was clearly proved on the trial, by direct and entirely uncontradicted evidence, that the act of the defendants in removing a portion of the house in question was done in obedience to a positive, mandatory order of the commissioner of highways of the city of Pittsburgh. That order was given

n conformity with the law as it then was. An ordinance for the opening of Kirkwood Street, from Highland Avenue to Collins Avenue, had been regularly ordained and enacted by the city councils. Viewers to assess damages and benefits had been regularly appointed, and had met and performed their duties, and made due report thereof according to law. After all this was done, the opening of the street was proceeded with until all obstructions were removed except the building in question. Preliminary notices had been given for the removal of the building, or a part of it, but the final and peremptory notice was not given until early in January, 1890. The matter of the opening and the probable removal of at least a part of the building had been known and talked of for several months before, and the plaintiffs had been in communication with the defendant Mellon in regard to it as early as October or November preceding. When the final order came in January for the removal of the building, it was an order which emanated from the proper officer, and it either had to be obeyed, or the city authorities would execute it at the expense of the owner. If he had refused to obey it, and the proper officer of the city had removed the building, undoubtedly the city would be liable for the consequences to any person injured, if the law under which the act was done was a void law. But it is just as undoubted that the officer who obeyed his orders in removing the building would not have been liable for his acts of obedience to his orders.

In the case of *Pittsburgh's Petition*, 138 Pa. St. 401, we decided not only that certain portions of the acts of 1887 and 1889, relating to streets and sewers in cities of the second class, were unconstitutional and void, but also that the city must pay for all work done under the proceedings, and for all damages inflicted upon property owners thereby. All the proceedings of the city for the opening of streets and assessment of damages and benefits, under the acts of 1887 and 1889, had at least color of authority under the language of those acts. If the real legal authority did not exist because those acts were unconstitutional, the city would be responsible for the damages sustained by their proceedings. But it does not at all follow that the officers or agents who executed the authority of the city in the premises would be subject to any such responsibility.

The commissioner of highways was the proper officer, both *de facto* and *de jure*, for the execution of the orders of the city

for the opening of streets, and could proceed with such execution without subjecting himself to a personal liability for his acts as such. He could not question the validity of his orders, and it was his duty to obey them. In the case of *Clark v. Commonwealth*, 29 Pa. St. 129, we held that even the acts of a president judge, whose right to his office was questioned, could not be impugned in any collateral proceeding. We said: "He is a judge *de facto*, and as against all parties but the commonwealth, he is a judge *de jure* also." In the case of *Campbell v. Commonwealth*, 96 Pa. St. 344, we enforced the same doctrine, saying, in relation to the challenged title of two associate judges: "Under due form of law, they hold their offices by title regular on its face. They are performing the duties thereby imposed on them, and enjoying the profits and emoluments thereof. Thus they are judges *de facto*, and as against all parties but the commonwealth, they are judges *de jure*. Having at least a colorable title to these offices, their right thereto cannot be questioned in any other form than by *quo warranto* at the suit of the commonwealth." In both of the foregoing cases, we refused to permit the validity of the acts done by the judges to be called in question in any collateral proceeding.

It is no doubt true that unconstitutional laws cannot confer either contract rights, or property rights, upon any persons, natural or artificial, and the validity of such laws may be directly questioned by any persons adversely interested. But that doctrine is not in conflict with the question which arises in this case. Here the question is as to the immunity from personal liability of a citizen who acts as the mere representative of a municipal officer, in the performance of a duty which apparently and by color of law rested upon him as a citizen, and which would necessarily be performed by the municipal officer without any personal liability if the citizen refused to obey the law and the mandate of the officer. If, in such circumstances, the municipal officer would be exempt from individual liability for executing the orders of the city, we know of no reason why the citizen should be subject to such liability, he being a person interested, and apparently subject to the duty of obeying the mandatory order of the authorities. No hardship results to the persons injured, as they have their recourse to the city, and it would be a severe hardship to hold the citizen liable for merely obeying the law as it is written.

Judgment reversed.

UNCONSTITUTIONAL STATUTES, LIABILITY FOR ACTS DONE UNDER: See extended note to *Kelly v. Bemis*, 64 Am. Dec. 51-55. The remarks of the court in the principal case respecting the non-liability of the municipal officer seem to be scarcely in harmony with the doctrines laid down in the majority of the decisions cited in that note. Apparently this exemption from liability is intended to be based upon the ground that protection may be accorded to a ministerial officer under such circumstances, because he is presumed to have acted without any discretion, in obedience to the orders of his superiors, and in discharge of the ordinary duties of his office. Such protection would be analogous to that which is sometimes extended to an officer serving process, while the party at whose instance the process is issued may be charged with responsibility to the person aggrieved by the wrongful proceedings: See *Savacool v. Boughton*, 21 Am. Dec. 181, and extended note thereto. If this is intended to be the *rationale* of the decision, it will be in line with *Sessums v. Bolts*, 34 Tex. 335, and *Henke v. McCord*, 55 Iowa, 378. Clearly, if the officer in such case is to be held free from liability, it would be unjust to impose any responsibility upon a citizen who acts merely as his representative. As a matter of public policy, there is, of course, much to be said in favor of thus discharging ministerial agents from liability, but it is undeniable that such an exemption is scarcely consistent with the ordinary rules, which determine the consequences of a declaration by the courts that a law is unconstitutional and void: See note to *Kelly v. Bemis*, 64 Am. Dec. 51. The question is full of difficulty; for although a good deal of hardship may undoubtedly be caused by making ministerial officers liable in these cases, too much caution cannot be exercised in creating exceptions to the operation of the great and salutary principle that an unconstitutional statute is "a protection to no one who has acted under it": Cooley's Constitutional Limitations, 186. The present conflict of decisions is presumably to be attributed to the acknowledged weight of these opposing considerations.

EWING v. PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY COMPANY.

[147 PENNSYLVANIA STATE, 40.]

DAMAGES. — MERE FRIGHT OR MENTAL AGONY caused by a railway accident, unaccompanied by some physical injury to the person, is too remote to sustain an action for negligence, although it produces permanent injury to the nervous system.

A. M. and J. D. Brown, for the appellants.

George B. Gordon and William Scott, for the appellee.

Per CURIAM. The wrong of which the plaintiff Eva Ewing complains was a collision of cars upon the railway of the defendant company, in consequence of which the cars "were broken, overturned, and thrown from the track, and fell upon the lot of ground and premises of the plaintiffs, and against

and upon the dwelling-house of plaintiffs, and thereby and by reason thereof greatly endangered the life of the said Eva Ewing, then being in said dwelling-house, and subjected her to great fright, alarm, fear, and nervous excitement and distress, whereby she then and there became sick and disabled, and continued to be sick and disabled, from attending to her usual work and duties, and suffered, and continues to suffer, great mental and physical pain and anguish, and is thereby permanently weakened and disabled," etc. To this statement the defendant demurred, and the court below entered judgment for defendant upon said demurrer. This ruling is assigned as error.

It is plain from the plaintiff's statement of her case that her only injury proceeded from fright, alarm, fear, and nervous excitement and distress. There was no allegation that she had received any bodily injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as accident cases will be very greatly enlarged; for in every case of a collision on a railroad, the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for the "fright" to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge.

Negligence constitutes no cause of action, unless it expresses or establishes some breach of duty: Addison on Torts, sec. 1338. What duty did the company owe this plaintiff? It owed her the duty not to injure her person by force or violence; in other words, not to do that which, if committed by an individual, would amount to an assault upon her person. But it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and if the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause. The rule on this subject is as follows: "In determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been seen by the wrong-doer as

likely to flow from his act": *Pittsburgh S. R'y Co. v. Taylor*, 104 Pa. St. 306; 49 Am. Rep. 580; *West Mahanoy Township v. Watson*, 112 Pa. St. 574; 56 Am. Rep. 336. Tested by this rule, we regard the injury as too remote.

We know of no well-considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. Mr. Wood fairly states the rule in his note to Mayne on Damages, at page 74: "So far as I have been able to ascertain, the force of the rule is, that the mental suffering referred to is that which grows out of the sense of peril, or the mental agony, at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action." In *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, a contractor of a railroad was blasting rocks within the right of way of the road. The blast blew rocks upon the plaintiff's land, and in addition to the damage to the land, plaintiff claimed damages for fright caused by apprehension of personal injury. Held, that he could not recover. Our own recent case of *Fox v. Borkey*, 126 Pa. St. 164, was a case of fright from blasting, and it was said by our brother Mitchell, "The injury was not the natural or proximate result of the act complained of." In *Lynch v. Knight*, 9 H. L. Cas. *577, Lord Wensleydale said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." To the same point are *Indianapolis etc. R. R. Co. v. Stables*, 62 Ill. 313; *Canning v. Williamstown*, 1 Cush. 451; *Johnson v. Wells*, 6 Nev. 224; 3 Am. Rep. 245. We need not discuss the authorities cited by the appellant. They are nearly all cases in which the fright was the result of or accompanied by a personal injury, and have no application to the case in hand.

Judgment affirmed.

DAMAGES FOR MENTAL ANGUISH. — The general rule is, that mental suffering is not an element of damage, unless based on bodily injury, or unless the injury from which it results was attended by circumstances of malice, insult, or oppression: *Dorrah v. Illinois Central R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629, and cases cited in note. See also extended notes to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534, and to *Wyman v. Leavitt*,

36 Am. Rep. 306. In Texas and Tennessee, it has been decided, in actions against telegraph companies for delay in the delivery of messages, that mental anguish alone might be made the basis of damages: See cases in note to *Western Union Tel. Co. v. Nations*, 27 Am. St. Rep. 918. But these were actions for breaches of contract, and the decisions were placed upon the ground that the mental suffering caused by the delay was a damage which was reasonably within the contemplation of the parties. In *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, the rule is said to be, that mental suffering is a proper element of damage when it is one of the direct, proximate, and natural consequences of an actionable wrong. In that case damages for mental suffering were recovered from one who mutilated a human body. If this statement of the rule is to be accepted as correct, the interesting question will present itself, whether the plaintiff in the principal case might not, by changing the form of her complaint, have recovered damages for her mental suffering. The invasion of her premises by the derailed train was clearly a trespass for which an action would lie. Could the "actionable wrong" thus inflicted have been made the basis for damages for mental suffering? The authorities, on the whole, seem to be against the possibility of recovering in such a case. Thus in *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, where damage had been done to real estate by heavy blasting, it was held that evidence regarding the fears of the plaintiff for her and her child's safety could not be considered in aggravation of damages. The same rule has been applied to the case of a forcible entry and detainer: *Anderson v. Taylor*, 56 Cal. 131; 38 Am. Rep. 52; and to the case of an injury to the due lateral support of a lot designed for a burial-place,—the defendant being ignorant of the intended use: *White v. Dresser*, 135 Mass. 150; 46 Am. Rep. 454. In *Meagher v. Driscoll*, 99 Mass. 281, 98 Am. Dec. 759, the plaintiff was allowed damages for the mental suffering caused by the act of the defendant in entering upon his land and digging up the body of his son. But the language of the court seems to show that the only cases in which it was considered proper to give damages for mental suffering resulting from trespasses upon land were those of "willful trespass, or trespass characterized by gross carelessness and want of ordinary care." This doctrine would seem to confine the recovery to circumstances in which exemplary damages might justifiably be allowed. As the authorities stand, therefore, it may perhaps be affirmed that *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, has laid down the rule somewhat too broadly, and that, to adopt the words of the court in *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, "there is no decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain an action."

SCOTT'S ESTATE.

[147 PENNSYLVANIA STATE, 89.]

WILLS — WHAT MAY CONSTITUTE. — An instrument in the form of a letter from a person in his last illness to his attorney, requesting the latter to draw a will in accordance with instructions therein set forth, and containing all the requisites of a will as to the disposition of property, may be established as a will by proof of its due execution and publication by the testator as such.

WILLS — WHAT MAY CONSTITUTE — EVIDENCE OF PUBLICATION. — When a person, during his last illness, causes a letter to be written to his attorney, with directions to him to draw a will in accordance with instructions therein contained, and such instrument contains all the requisites of a valid will as to the disposition of property, is signed by the testator as such, and by the person writing the body of it as a subscribing witness, parol evidence is admissible to show that the testator declared and intended the instrument to be his last will and testament.

WILLS — WHAT MAY CONSTITUTE — EVIDENCE OF PUBLICATION. — When a person, during his last illness, writes a letter to his attorney, directing him to draw a will in accordance with instructions therein contained, and such instrument contains all the requisites of a will as to the disposition of property, is signed by the testator and by one subscribing witness, a son of the testator, who is acquainted with all the circumstances under which the instrument was drawn, and to whom the testator has declared it to be his last will, is competent to prove its publication as such, and thus supply the place of one attesting witness, provided its execution is duly proved, although he did not see it after it was prepared and executed.

WILLS — ATTESTATION AND PUBLICATION. — Circumstances may supply the want of one witness to a will, provided they go directly to the immediate act of disposition.

John Dalzell, William Scott, George Gordon, and David Q. Ewing, for the appellants.

James F. Robb, P. C. Beard, and A. M. and John D. Brown, for the appellee.

PAXSON, J. This was an appeal from the decree of the orphans' court of Allegheny County, vacating the probate of the will of John Scott, deceased. The alleged will is so brief that I give it entire: —

“PITTSBURGH, March 16, 1889.

“HON. JOHN DALZELL, Attorney.

“*Dear Sir,*—Will you kindly, at your earliest convenience, cause a will to be made for me,—

“First. Providing for the payment of all my just debts.

“Second. Providing for the appointment of John F. Scott and William Stewart as executors, without bonds.

“Third. Providing for the following division of the pro-

ceeds of the real and personal property between my children, as follows:—

To John F. Scott	\$75,000
Lucy Painter	45,000
Mary O. Burns	45,000
Robert R. Scott	45,000
David S. Scott	45,000
Ella C. Scott	45,000
Herman G. Scott	45,000
William W. Scott	1
Charles V. Scott	1
Maurice Scott	1
Also to my grandchild John Sample Scott . . .	5,000
	<hr/>
	\$350,003

“Any excess or deficiency from the gross sum of \$350,003 which the estate may yield on its final settlement to be pro-rated between the several heirs in the proportion which the shares designated for them bears to the aggregate of \$350,003. In this connection, I desire to state, that as Mrs. Olivia R. Scott has already, as you are aware, been quite amply provided for out of my estate, it is my desire that she should not in any way participate with my children in the estate now to be divided, and referred to in the foregoing statement.

“Yours truly, JOHN SCOTT.

“Witness: WILLIAM STEWART.”

The body of this paper is in the handwriting of Mr. Stewart, the subscribing witness. The signature of Mr. Scott was proved by three witnesses. There is no question as to the genuineness of the paper. That it is not in form a will may be conceded; yet if the request to Mr. Dalzell to prepare a will had been omitted, it might have passed as a testamentary paper. It contains every requisite of a valid will. It provides,—*a.* For the payment of his debts; *b.* Names his executors; *c.* Divides his entire estate among his children; and *d.* Explains why he makes no provision for his wife.

The testimony shows that the paper was prepared by William Stewart, at Mr. Scott's request, during his last sickness; that when Mr. Stewart brought it out to him, Mr. Scott got out of bed, signed it, and handed it back to Mr. Stewart, and told him to put it in his (Stewart's) box in the Fidelity Title and Trust Company; that it was a good will, — “as good a one as I want.” In the language of the witness Stewart, “He said

that that will would be probated, — this document would be probated; he said it was his will." The evidence of this witness is clear and precise that Mr. Scott regarded and declared this paper to be his last will and testament.

The other witness was John F. Scott, a son of the testator. He testified that his father had spoken to him about making a will a few days before it was signed, and had directed him to send Mr. Stewart out to his residence for that purpose. Mr. Stewart came, and had an interview with Mr. Scott; the same day he requested the witness, who had the sole charge of his father's affairs, to make a statement of the amount of his estate. This statement was furnished, showing that the estate would realize about three hundred and fifty thousand dollars after paying all expenses. What next occurred is best told in the language of the witness: "He [Stewart] asked for pen, paper, and ink, — that was in 61 Fourth Avenue, — and he went over to the far end of the room, took the young man's desk, and sat there and figured and wrote. He said he was going out at noon, and for me to come out at the usual time in the afternoon. He went out at noon, and I started out about four o'clock, went up to father's, and went in the room, and asked him how he felt. 'Oh,' he says, 'I'm better.' He says, 'I have got up and walked over to the bureau, and signed my will.' I says, 'My, father! you ought not to have done that; the doctor told you to keep perfectly quiet. I think you ought to have signed that in bed.' 'O, no,' he says; 'I am much better; I am all right.'

"Q. Who was in the room at the time? A. Mr. Stewart.

"Q. You, and Mr. Stewart, and your father? A. That was all. Nothing more was then said about the will, and we had supper. After supper, we went up to his room, and was sitting there smoking; father was smoking too, and Mr. Stewart and myself, and he says to him, he says, 'Now, Billy, that is as good a will as can be drawn; if anything happens to me, have that probated.' He says: 'I was up in the register's office a short time ago in the Knox-Slataper will case, and was waiting on Mr. Hampton there, and Mr. Hampton explained to me about the case, and I called his attention to a gentleman who had written a letter to his attorney some forty years ago, just directing a will to be drawn, and that will, that letter, was made good; and Mr. Hampton went to the records and looked back, and was very much surprised at my memory going back

forty years.' " The witness further stated that he never saw the paper in question until after his father's death and burial.

Both of the witnesses refer to the testator's familiarity with the Knox-Slataper will case, — reported in 131 Pa. St. 220; 17 Am. St. Rep. 798, — and this was probably the key-note to testator's belief that the letter to Mr. Dalzell, expressing his wishes in regard to his estate, was a will in fact, although not in form.

It was contended by the appellees, — *a.* That parol evidence was not competent to show that the testator declared this paper to be his will; and *b.* That even if such evidence were admissible, the paper was not sufficiently proved. We cannot sustain the first proposition, nor do we think any of the authorities cited by the appellees apply to the facts of this case. It must not be overlooked that we are dealing with a genuine paper, signed by the testator, which, if not actually a will upon its face, is dangerously near one. Treating a will as the legal declarations of a man's intentions which he wills to be performed after his death, we have here the testator's intentions fully expressed. The paper itself being proved by three witnesses, we see no reason why parol evidence should not be received that he declared it to be his last will and testament.

The remaining question is more important. Was the paper sufficiently proved? Not its execution, for that, as before observed, was proved by three witnesses, but the fact that the testator intended it as his will, and declared it to be such. The law requires a will to be proved by two witnesses. We have here two witnesses as to the fact of publication as a will, but it is alleged that one of them, John F. Scott, falls short of being a full witness. This arises from the fact that he did not actually see and identify the paper on the evening of its execution.

If he were an ordinary witness, called in casually, with no knowledge of the circumstances, there would be more force in this contention. But the witness Scott was familiar with the entire transaction. He knew his father was making a will. He had been consulted about it, and furnished the information upon which it was made. He followed Mr. Stewart out to his father's house the same afternoon, and arrived there shortly after it was signed. He there found his father and Mr. Stewart together, and was there informed by his father that he had made his will, and had given it to Mr. Stewart to keep. Moreover, the conversation plainly showed that the will

was not in the usual form, but in the shape of a letter to his attorney. It is not pretended that there was any other letter, any other paper, or any other will executed on that day by Mr. Scott, and handed to Mr. Stewart. We think the witness Scott sufficiently identified the paper, and that it was proved by two competent witnesses, "each of whom make complete proof in itself, so that if the act of assembly were out of the question, the case would be well made out by the testimony of either."

Carson's Appeal, 59 Pa. St. 498, gives color to the position that circumstances may supply the want of one witness, when they go directly to the immediate act of disposition. In that case the will had been signed by a mark, and one of the witnesses failed to positively identify the mark as that of testator, and the court held that there were circumstances which justified the holding of the testimony of the witness to be sufficient. It is true, Justices Sharswood and Agnew held there was the full proof of two witnesses, and concurred in the judgment on that ground. If we hold that under no circumstances can a paper be proved without its actual production and inspection, we might be driven to the conclusion that the testimony of Scott was not sufficient to identify the paper, and that he was not a full witness. But he identified this paper sufficiently for any of the practical business of life, and we think it a substantial compliance with the act of assembly. This view renders a discussion of the numerous cases cited on either side unnecessary. The case is *sui generis*, and must be decided upon its own facts and the act of assembly.

The decree is reversed, at the costs of the appellees, and it is ordered that the letters testamentary heretofore granted by the register of wills upon the estate of John Scott be reinstated.

WILLS — WHAT INSTRUMENTS WILL BE DEEMED WILLS. — For numerous cases in which letters have been admitted to probate as wills, see extended note to *Burlington University v. Barrett*, 92 Am. Dec. 385. The facts in *Barney v. Hayes*, 11 Mont. 571, 28 Am. St. Rep. 495, were somewhat similar to those in the principal case. Under a statute allowing olographic wills, a letter written by a testator to his attorney, saying, "What I want is for you to change my will, so that she may be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I do not know what ought to be done, but you do," — was held to be entitled to probate with the will to which it referred. An example of a letter which was held not to be testamentary in character will be found in the case of *Estate of Richardson*, 94 Cal. 63. The rule is, that an instrument is a will, whatever its form, if the intention of the maker to dispose of

his estate after death be sufficiently manifested, and the writing have the statutory formalities: *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 283. A paper will not be regarded as a will, unless the maker had the *animus testandi* at the time: *Booster v. Rogers*, 9 Gill, 44; 52 Am. Dec. 680. Nor will a testamentary paper, by its terms to take effect on happening of a certain contingency, be admitted to probate as a will, if the contingency does not happen: *Morrow's Appeal*, 116 Pa. St. 440; 2 Am. St. Rep. 616.

WILLS. — PROOF BY ONE WITNESS, OR BY ONE WITNESS AND CORROBORATIVE CIRCUMSTANCES: See note to *Greenough v. Greenough*, 51 Am. Dec. 575. The law does not prescribe a mode of proof of a will, nor require it to be proved as well as attested by a specified number of witnesses: *Jesse v. Parker*, 6 Gratt. 57; 52 Am. Dec. 102.

WILLS, PAROL EVIDENCE RESPECTING: See notes to *Chambers v. Watson*, 46 Am. Rep. 72-78; *Kurtz v. Hibner*, 8 Am. Rep. 669-673; *Towles v. Burton*, 24 Am. Dec. 413-417. Parol evidence is admissible when its introduction is required by considerations extrinsic of the will, where it tends to establish and sustain the will, or where it consists of the declarations of the testator made at the time of the execution of the will, and showing its legal quality; such evidence is part of the *res gestæ*: *Lorietz v. Keller*, 5 Iowa, 196; 68 Am. Dec. 696. Resort may be had to secondary evidence, where direct proof of the execution of the will cannot be adduced, owing to the nature of the case; but this must be sufficient to establish with reasonable certainty all the facts which concur in the execution of a valid will: *Tynan v. Paschal*, 27 Tex. 286; 84 Am. Dec. 619.

SWENTZEL v. PENN BANK.

[147 PENNSYLVANIA STATE, 140.]

BANKS AND BANKING — LIABILITY OF BANK DIRECTORS. — Bank directors, being gratuitous mandatories, are liable only for fraud, or for such gross negligence as amounts to fraud. A bank director cannot be held, as such, to the same ordinary care that he takes of his private affairs; and if he exercises the ordinary care which bank directors usually exercise, he is not liable for a misapplication of the funds of the bank by its officers.

BANKS AND BANKING — LIABILITY OF BANK DIRECTORS. — WANT OF ORDINARY CARE which constitutes negligence on the part of a director of a national bank will constitute negligence on the part of a director of a state bank, and will subject him to the same liability.

BANKS AND BANKING — LIABILITY OF BANK DIRECTOR — MEASURE OF CARE. — When the director of any bank performs his duties as such in the same manner as they are performed by all other directors of all other banks in the same city, he is not guilty of gross negligence or fraud.

BANKS AND BANKING — LIABILITY OF DIRECTORS FOR THEFT OF PRESIDENT. — When the funds of a bank are stolen by its president, assisted by its cashier and clerks, by means of false entries wholly concealed from its directors, and which could only be discovered by an expert, while the reports of the condition of the bank made by its president from time to time show it to be in good financial condition, and there is nothing to

arouse the suspicion of the directors, they cannot be held liable for the theft.

BANKS AND BANKING. — BANK DIRECTORS ARE NOT GUILTY OF GROSS NEGLIGENCE in not examining the individual ledger of the bank to ascertain its financial condition, when, by the rules of the bank, and of four fifths of the other banks in the same city, bank directors are not permitted to see such book.

BANKS AND BANKING — WITHDRAWAL OF DEPOSIT BY DIRECTOR — SUSPENSION OF BANK — REPAYMENT. — When a director of a bank, acting upon information obtained as such, withdraws the deposit of a partnership of which he is a member on the day of the suspension of the bank, he will be ordered to repay it, as he cannot thus gain a preference over other creditors.

H. A. Miller, D. F. Paterson, and A. M. Brown, for Henry Warner, assignee of the Penn Bank, appellant.

S. Schoyer, Jr., D. T. Watson, J. M. Stoner, George W. Guthrie, Isaac S. Van Voorhis, T. C. Lazear, and Knon and Reed, for the directors of the Penn Bank.

T. C. Lazear and Orr, for Thomas Hare.

PAXSON, J. This case has been so carefully considered by the learned master and court below, that little remains for us to add. Indeed, in a case of such magnitude, involving a vast mass of testimony, we can do little more than see that the principles upon which it has been decided below are sound.

Briefly stated, the bill was filed for the purpose of holding the officers and directors of the bank responsible for the losses resulting from its failure. It is claimed that the officers and directors were negligent in their management of the bank's affairs, and that by reason of such negligence the losses occurred.

It is conceded on all sides that the losses and the disastrous failure of the bank were directly traceable to Mr. Riddle, its late president, now deceased. He practically emptied the vaults of the bank in carrying on a gigantic speculation in oil. This was done with the knowledge of the cashier, and the co-operation of one or more clerks or subordinates. It would have been extremely difficult, if not practically impossible, for any person to have committed such a swindle without the co-operation of some one inside. The question is, whether the directors ought to have known of these transactions, and whether their failure to know what the real plunderer was doing was such negligence on their part as to render them liable to the creditors of the bank.

The Penn Bank closed its doors in May, 1884. It is not too much to say that its failure was a great shock to the business interests of Pittsburgh. It was the cause of much excitement; led to a large amount of litigation, much of it directed against the board of directors. As usual in such cases, the current of public opinion was turned against them, and up to the present time they have been defending themselves against hostile litigation. The time has now arrived when the rights of the parties can be considered calmly, and disposed of in disregard of prejudice or popular clamor.

The first question that naturally suggests itself for our consideration is, the extent of the duty which the directors of a bank owe to the stockholders, whom they represent directly, and the creditors, whom they represent indirectly.

Upon this point there is a general misapprehension in the popular mind. This finds expression, after bank failures, in severe condemnation of directors, and a general assertion of the doctrine that their duty requires them to be familiar with all the details of the management. In the popular mind they are held to the rule that they ought to take the same care of the affairs of the bank that they do of their own private business. Even the learned judge below evidently adopted this view, when he said in his opinion: "If we were to decide this case on first impressions as to the conclusions of fact to be drawn, and under the decisions cited and rules laid down in the minority opinion in *Briggs v. Spaulding*, 141 U. S. 132, we would say there was gross negligence, or want of the ordinary care that a man of fair intelligence would take of his own affairs."

It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatory. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods — generally once or twice a week — for an hour or two. The condition of the bank is then laid before him, in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank, in which he participates. The cash on hand is counted, the bills receivable and sureties examined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in

the care of salaried officials, who are paid for such services, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs.

A vast amount of authority has been cited upon this question, which we do not think it necessary to review. It is sufficient to refer to a few cases only. In *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, the subject is very fully discussed by the late Justice Sharswood, and the rule of ordinary care is laid down, — not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank. Negligence is the want of care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons from whom he receives no compensation.

The same learned judge, in *Maisch v. Seamen's Saving Fund Soc.*, 5 Phila. 30, laid down the rule as follows: "As to the directors, however, receiving no benefit or advantage, they can be considered only as gratuitous mandatories, liable only for fraud, or such gross negligence as amounts to fraud." Again, in *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, he said: "Indeed, as the directors are themselves stockholders, interested, as well as all others, that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill."

We may also refer to *Briggs v. Spaulding*, 141 U. S. 132, which goes even further than our own cases upon this point. It does not relieve a director from the consequence of gross

negligence in the performance of his duty, but it holds that he is not responsible, where he has used the ordinary care which bank directors usually exercise. It is true, this was the case of a national bank, but we apprehend that what is negligence on the part of a director of a national bank would, as a general rule, be negligence by a director of a state bank, and subject to the same liability.

In regard to what is ordinary care, regard must be had to the usages of the particular business. Thus if the director of a bank performed his duties as such in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that he was guilty of gross negligence. And care must be taken that we do not hold mere gratuitous mandatories to such a severe rule as to drive all honest men out of such positions. This thought is so well expressed by Sir George Jessel, M. R., in his opinion in *In re Forest of Dean Coal Mining Co.*, 10 Ch. Div. 450, that I give his remarks in full: "One must be very careful, in administering the law of joint-stock companies, not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a neglecting to sue, though he might, by suing earlier, have recovered a trust fund; in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle."

Holding, then, the rule to be, that directors who are gratuitous mandatories are only liable for fraud, or for such gross negligence as amounts to fraud, it remains but to apply this principle to the facts of this case.

It is not alleged—it has never been alleged—that the hands of these directors are stained by fraud. The bank was wrecked by its president, with the cashier and some of the clerks aiding and abetting. It was adroitly done, so far as the means were concerned, and it was concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The reports of the bank's condition, made

by the president to the directors from time to time, showed it to be in good condition, while in point of fact it was honey-combed with fraud, and its assets squandered in wild speculations. It may be asked, Why did not the directors discover this by an examination of the books? The answer is, that, if they had examined every book in the bank, with a single exception, they would not have found the fraud. That exception is the individual ledger. All the frauds were dumped into this book, and appeared nowhere else. The individual ledger contains the accounts of the individual depositors, and this book, by the rules of a large majority of the Pittsburgh banks, the directors are not allowed to see. This is a rule of policy on the part of most city banks, and the reason for it is, at least, plausible. A director largely engaged in business may have a number of rivals in the same business who are depositors in the bank. If he is permitted to examine their accounts, it gives him an advantage and an insight into a rival's affairs that few business men would tolerate. Hence it is a question with many banks whether to adopt this rule or lose valuable customers, and they generally prefer the former. We are not speaking of the wisdom of the rule, only of its existence, as bearing upon the question of the directors' negligence. Are they to be held to be guilty of gross negligence in not examining a book, which, by the rules of their own bank, and of four fifths of the other banks in Pittsburgh, the directors were not permitted to see?

Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier, and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high; they were the trusted agents of the corporation, paid for their services, and regarded in the community in which they lived as honest men.

Aside from this, the directors were among the heaviest stockholders of the bank. They collectively owned a large proportion of it. And so thoroughly were they deceived by the president as to its condition that, when the first stoppage occurred, they not only believed the suspension was temporary, but they showed their faith by their works, and upon their individual credit raised the sum of two hundred and eighty-nine thousand dollars to enable it to resume. They did not desert the ship like a parcel of drowning rats, but imperiled their private fortunes in an effort to keep it afloat.

Under such circumstances it would be an act of gross injustice to hold them liable for the frauds of others, in which they had not participated, — of which they had no knowledge, — and which have only been brought to light with the aid of experts. We must measure this transaction by the light which these directors had at the time the transaction occurred. It would be unfair to judge them by the calcium light which has been turned on for six years, and which has enabled us to trace at last the sinuous path of Riddle and his confederates in crime, and the means by which this bank has been robbed and plundered. We are of opinion that the master and the court below were right in their conclusion, and the decree is affirmed upon the appeal of the assignee, and the appeal dismissed, at his costs.

HUTCHINSON'S APPEAL.

This was a cross-appeal from the same decree as that in Warner's appeal. It was taken by the directors of the bank, and they complain that "the court below erred in imposing upon the directors, the defendants below and appellants here, the costs of this case, including a master's fee of two thousand five hundred dollars."

Costs in equity are in the sound discretion of the court, and we always hesitate to reverse for the exercise of such discretion. In this case, however, the directors have been compelled to defend themselves for years against litigation, which a careful and dispassionate examination of the case, at the proper time, would have shown to be without merit. Having succeeded in vindicating themselves from the charges made against them, we do not think they should now be compelled to pay the costs. The general rule is, that the losing party shall pay the costs of his unsuccessful litigation, and we see nothing in this case to take it out of this rule.

The decree is reversed as to costs, and it is ordered that the costs here and below, including the master's fee, be paid out of the funds in the hands of the assignee.

Thomas Hare, one of the defendants, assigns as error upon the appeal, that the court below erred in making and entering the sixth paragraph of the decree, which orders him to pay to the said assignee the sum of \$3,716.23, with interest thereon from May 26, 1884, less five and seven eighths per cent of the principal sum, said deduction being the amount of the divi-

dend paid by the assignee to creditors upon the distribution heretofore made by said assignee.

The facts are as follows: Thomas Hare and Son, appellant's firm, had the sum of \$3,716.23 on deposit in the Penn Bank on the day the bank finally closed. Being in the bank at the time, he drew this money out. The master and the court below held that he had no right to do so, and thus obtain a preference, after the bank had closed. There could be no doubt about this if the money had been his individual money. But he contends, that because it belonged to his firm he had a right to withdraw it. We think it is a distinction without a difference. It was his act, and even if we treat it as the act of the firm, it was done upon information obtained by him in his confidential relation as a director of the bank. We think the decree against him was properly entered, and his appeal is dismissed, at his costs.

BANKS AND BANKING — DUTIES AND LIABILITIES OF BANK DIRECTORS. — It is the duty of bank directors to use ordinary diligence in acquiring knowledge of the business of the bank; and they will be held to be affected with knowledge of such facts as appear on the bank-books: *United Society v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731. Depositor in bank may recover from its directors for damages resulting to him from want of ordinary care and diligence in permitting it to be held out as solvent, when it was insolvent: *Delano v. Chase*, 121 Ill. 247; 2 Am. St. Rep. 81; *Seale v. Baker*, 70 Tex. 283; 8 Am. St. Rep. 592, and note. A director of a bank undertakes that he possesses at least ordinary knowledge and skill, and that he will bring them to bear upon his duties. He must exercise ordinary care and diligence, and if, through recklessness and inattention to the duties confided to him, frauds and misconduct are perpetrated by other officers and agents, or co-directors, which ordinary care on his part would have prevented, he is personally liable for the loss resulting: *Marshall v. Farmers' etc. Bank*, 85 Va. 676; 17 Am. St. Rep. 84. See the note to this case for an extended discussion of the subject. In *Jones v. Johnson*, 86 Ky. 530, the language used was, that the directors are liable only for gross negligence in the management of the affairs of the bank; and in *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, it was held that the active management may be left to the cashier and other agents selected by the directors, whose duty in respect to such cashier is to supervise, direct, and control them, and that the diligence required of directors is that exercised by prudent men in their own affairs, being that degree of diligence characterized as ordinary.

BANKS AND BANKING. — FIDUCIARY RELATIONS BETWEEN THE DIRECTORS AND THE CORPORATION: See extended note to *Beach v. Miller*, 17 Am. St. Rep. 298-308. At page 307 of that note are cited several cases supporting the principle that the rights of a director must not be so exercised as to give him a preference over its other creditors, and that if so exercised, the transaction will be avoided.

ALLISON v. WOOD.

[147 PENNSYLVANIA STATE, 197.]

CORPORATIONS — STOCK SUBSCRIPTION — LIABILITY OF PROMOTER ON PROMISE TO REFUND SUBSCRIPTION. — When one is induced to subscribe for stock in a railway corporation by the promise of one of its promoters that if the railroad is not finished within a certain time the subscription shall be returned by the corporation, or in default thereof, by the promisor, such promise constitutes a contract of suretyship, and the consideration therefor is the subscription by the promisee to the stock of the corporation.

William W. Wiltbank and Theodore A. Tack, for the appellant.

Samuel Dickson, for the appellee.

Per CURIAM. We agree with the court below that the affidavit of defense is insufficient. The plaintiff's statement of claim avers that his subscription to the stock of the Philadelphia and Sea Shore Railway Company was made upon the faith of the letter of the defendant to the plaintiff, dated September 4, 1889. In this letter the defendant said: "In consideration of your subscription of five thousand dollars to the stock of the proposed Philadelphia and Sea Shore Railway Company, I agree that it is understood that the said road shall be completed to Cape May by October 1, 1890, and in default thereof, I agree that the money paid by you on said subscription shall be returned to you by the said company, or in default thereof, I shall do it myself at that time."

This was a contract of suretyship, based upon a sufficient consideration. It sometimes happens that the promoters of railways and other enterprises induce their friends to take stock therein by holding out inducements like the foregoing, or others of a similar character. In such instances the consideration for the promise is the subscription by the promisee to stock which he did not want, in an enterprise in which he felt no particular interest. It is only just that a person who induces others to subscribe for stock under such circumstances should be held to his contract.

Judgment affirmed.

SURETYSHIP — CONSIDERATION. — The term "surety" is generally used in a limited sense, to designate one who enters into a contract with another, as principal, either jointly, or jointly and severally, and at the same time, and who in all cases may be sued jointly with the principal without demand or notice: *Read v. Cutts*, 7 Me. 186; 22 Am. Dec. 184. A guaranty is a prom-

se to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person who is in the first instance liable: *Matthew v. Chrisman*, 12 Smedes & M. 595; 51 Am. Dec. 124. The surety is bound with his principal as an original guarantor, and his obligation to pay is equally absolute, irrespective of any notice of the principal's default, while a guarantor is an individual contractor, to answer only for the consequences of the default of the principal, and is therefore entitled to notice of such default: *McMillan v. Bull's Head Bank*, 32 Ind. 11; 2 Am. Rep. 323. The surety of a corporation is liable, even if the obligation of the corporation is beyond its powers: *Gist v. Drakely*, 2 Gill, 330; 41 Am. Dec. 426. Contract of suretyship not under seal must be supported by sufficient consideration: *Kulenkamp v. Groff*, 71 Mich. 675; 15 Am. St. Rep. 283. Consideration to support promise need not involve benefit to promisor, but is equally sufficient when it consists in a detriment to the person to whom it is made: *New Hanover Bank v. Bridgers*, 98 N. C. 67; 2 Am. St. Rep. 317; *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693.

CARSON v. FEDERAL STREET AND PLEASANT VALLEY RAILWAY COMPANY.

[147 PENNSYLVANIA STATE, 219.]

STREET-RAILWAYS — LIABILITY AT CROSSINGS — CONTRIBUTORY NEGLIGENCE OF SERVANT. — When a wagon is crushed at a crossing by collision with a street-car, caused by the negligence of the driver of the wagon, who is in the employ of its owner, such owner is affected by the negligence of his servant, and cannot recover for the injury.

STREET-RAILWAYS — LIABILITY AT CROSSING — DUTY OF TRAVELER TO LOOK AND LISTEN. — A person about to cross a street-railway track need not stop, but he must look and listen, so as to avoid walking or driving directly in front of a moving car; and if he fails to so look and listen, he is guilty of contributory negligence, and cannot recover for injuries resulting from being struck by the car.

William Stone, for the appellant.

Jacob H. Miller and McBride, for the appellee.

GREEN, J. The facts of this case do not seem to be involved in controversy. The defendant operates a line of street-cars passing through Washington Street, in the city of Allegheny. The plaintiff's team, in charge of Orr, the driver, was engaged in hauling along C Street, in the same city. In going along C Street to his destination, Orr's route crossed Washington Street, and the defendant's tracks therein, at right angles. When he reached the intersection he neither stopped nor looked, but drove directly upon the defendant's track. When in this position he looked up and saw the car just upon him. There

was no time to escape. His wagon was crushed and he was injured.

This action is brought by his employer, who is affected by the contributory negligence of his employee. The question upon which the case turned in the court below was, whether the evidence of the plaintiff established contributory negligence in Orr, the driver. Upon this subject the learned judge instructed the jury that there was no rule of law that required the driver to "stop, look, and listen," but that it was for them to determine what it was his duty to do, and whether he actually did it on this occasion. They were thus left without any rule of law to apply, at liberty to make one to suit themselves for the purpose of this case, which the next jury might change to suit themselves, or disregard altogether. We cannot agree to this. The street-railway has become a business necessity in all great cities. Greater and better facilities and a higher rate of speed are being constantly demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a higher measure of care necessary, both on the part of the street-railways, and those using the streets in the ordinary manner. It is the duty of the railway companies to be watchful and attentive, and to use all reasonable precautions to give notice of their approach to crossings and places of danger. Their failure to exercise the care which the rate of speed and the condition of the street demand is negligence. On the other hand, new appliances, rendered necessary by the advance in business and population in a given city, impose new duties on the public.

The street-railway company has a right to the use of its track, subject to the right of crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour; but it is necessary to look before driving upon the track. If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly nonsuited: *Marland v. Pittsburgh etc. R. R. Co.*, 123 Pa. St. 487; 10 Am. St. Rep. 541. It is in vain for a man to say that he looked and listened, who walks directly in front of a moving locomotive. An injury so received is due to his own gross careless-

ness: *Pennsylvania R. R. Co. v. Bell*, 122 Pa. St. 58; *Moore v. Philadelphia etc. R. R. Co.*, 108 Pa. St. 349. Orr testified that he knew the crossing, that he listened for the sound of a gong, but, not hearing it, drove on the track, and was instantly struck. He drove in front of a moving car so near to him as to make a collision inevitable. If he had looked, he could have seen the car and stopped, and the accident would have been avoided. Not to do so was, in the language of *Pennsylvania R. R. Co. v. Bell*, 122 Pa. St. 58, "gross negligence," and justly defeats the action brought to recover from another damages that were self-inflicted. It is the duty of one about to cross a street-railway track to look, so that he may not walk directly in front of a moving car to be struck by it. The first assignment of error is sustained. So, also, are the second and third.

The judgment is reversed.

STREET-RAILWAYS — DUTY OF FOOT-PASSENGERS AT CROSSINGS. — The fact that one passing from a sidewalk crossing in a city stops upon the track of a street-railroad without first looking to see whether a car is approaching or not, is not, as a matter of law, negligence, whether the cars accustomed to run on such track are grip-cars or horse-cars: *Chicago City R'y Co. v. Robinson*, 127 Ill. 9; 11 Am. St. Rep. 87.

CONTRIBUTORY NEGLIGENCE OF PERSON INJURED, EFFECT OF: See note to *Robinson v. New York etc. R. R. Co.*, 23 Am. Rep. 4-9.

KRUG v. GERMAN FIRE INSURANCE COMPANY.

[147 PENNSYLVANIA STATE, 272.]

INSURANCE — USE OF PREMISES. — One brief violation of the terms of a policy of fire insurance for necessary work incidental to the preservation of the insured property will not be considered a breach of a condition prescribing the use of the premises.

INSURANCE — USE OF PREMISES — BREACH OF CONDITION. — When a policy of fire insurance on a canning factory and the goods therein provides that the premises shall not be used for any other purpose than storage, the building of a fire in the furnace under the engine, on the insured property, for the purpose of emptying the boiler and pipes therein, to prevent their freezing during the winter, is not such a breach of the condition as will avoid the policy in case the property is destroyed as the result of building such fire.

Henry N. Paul, for the appellant.

Charles A. Lagen and William Pinkney Whyte, for the appellees.

PER CURIAM. The plaintiff brought this suit in the court below upon a policy of insurance issued by the defendant company, whereby he was insured by loss against fire for six months, from twelve o'clock, noon, April 10, 1889, to twelve o'clock, noon, October 10, 1889, upon "frame building and shedding attached thereto, known as canning-house," and on machinery, canned goods, etc., contained therein. On the face of said policy was indorsed the following: "It is understood and agreed that this policy shall be void and of no effect in case the premises herein described shall be occupied for any purpose other than storage." This policy was renewed by indorsement dated October 10, 1889, for six months from the date of said indorsement.

The factory was operated as a canning factory during the entire canning season of 1889, work having commenced in July of that year, and not having ceased until October 10th. On that day all the hands employed were discharged except two or three. On Tuesday, October 15th, a fire was built in the furnace under the engine, which was upon the premises, for the purpose of blowing out from the pipes and boiler the water which had remained there since the preceding Thursday. At ten o'clock that night the premises were destroyed by fire.

The company refused to pay, on the ground that there had been a violation of the condition of the policy, which provided that it should be void in case the premises were occupied otherwise than for storage. At the time the fire occurred, and for some days previous thereto, the premises had been occupied for storage purposes only. All that was done after that date was the clearing up and the cleaning of the premises after the work of the season was over. The fire was merely built, as before stated, to empty the boiler and pipes of water, and to prevent their freezing during the winter, when the building was to be used exclusively as a place of storage for the goods manufactured during the summer. A fire for such purpose would be no more a violation of the condition of the policy than a fire left to warm the men in charge of it during the cold weather. A policy provides for the continued usual condition of the premises. A single brief violation of the terms of the policy for the necessary work incidental to the preservation of the property insured will not be considered a breach of a condition which prescribes the use of the premises. In *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 647, the policy forbade the keeping of benzine on the premises.

With proper caution, the insured took and used benzine on the premises insured, for the purpose of cleaning machinery, and it was held that the words "keep or have" were intended to prevent the permanent and habitual storage of the prohibited articles, and that taking them on the premises for the purpose of cleaning the machinery was not embraced within the meaning of these words. It was said, in the opinion of the court: "It would be straining a point to say that bringing a prohibited article upon the premises upon a single occasion, and for the sole purpose of cleaning the machinery, was keeping or having it there within the meaning of the policy."

We think there is no merit in the contention that the cleaning of the premises, and building the fire on October 15th, was a continuation of the business which had been carried on during the summer, and which had ended on October 10th. We are of opinion that judgment was properly entered for the plaintiff.

Judgment affirmed.

FIRE INSURANCE — CONDITION AS TO USE OF PREMISES. — Conditions and provisos are to be construed strictly against the underwriters, as they tend to narrow the range and limit the force of the principal obligation: *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337. Keeping liquors for use of a family, or for the purpose of selling to the boarders or others, is not a "storing" of spirituous liquors, within the prohibition of the policy: *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harr. (N. J.) 480; 38 Am. Dec. 525. So where a policy of insurance upon a "dwelling-house to be occupied by the tenants" provided that it should be wholly void if the premises should at any time be occupied or used, in whole or in part, for any purpose, whether manufacturing or otherwise, different from that set forth in the application or policy, or if the risk should be increased by means within the control of the assured, and the tenants used the second story of the house for shaving hoops for a period of one week, and the jury found that it did not materially increase the risk, it was held that there was no substantial breach of the condition: *Kircher v. Milwaukee etc. Ins. Co.*, 74 Wis. 470. So a change in the use of the insured property does not affect the policy, where the property insured as a private dwelling is used for a boarding-house, the policy not prohibiting the keeping of boarding-houses: *Rafferty v. New Brunswick Fire Ins. Co.*, 3 Harr. (N. J.) 480; 38 Am. Dec. 525; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352; 25 Am. Rep. 780. So in the absence of express stipulation to the contrary, a change of tenants has no effect on a contract of insurance of a dwelling-house, if the use be not changed: *Cumberland Valley Mut. Prot. Co. v. Douglas*, 58 Iowa, 419; 98 Am. Dec. 298. So a warranty that the insured premises are "occupied as a boarding-house" is not broken by their occupancy in part as a bar-room and billiard-room, where such occupancy is not forbidden, and does not increase the risk: *Martin v. State Ins. Co.*, 44 N. J. L. 485; 43 Am. Rep. 397. And, generally, acts done in an insured building which do not change its nature and character, although

out of the ordinary and appropriate use thereof, do not vacate the policy, unless such acts are fraudulent or grossly careless, and, if grossly careless, are also the cause of the loss: *Billings v. Tolland County etc. Ins. Co.*, 20 Conn. 139; 50 Am. Dec. 277.

LONG v. PENNSYLVANIA RAILROAD COMPANY.

[147 PENNSYLVANIA STATE, 343.]

COMMON CARRIERS — LIABILITY FOR LOSS OF BAGGAGE BY FLOOD. — A common carrier is not liable for the loss of baggage destroyed while in his possession by an unprecedented flood amounting to an act of God, such as the "Johnstown flood," in the absence of evidence of want of care on his part.

NEGLIGENCE, WHEN NOT PRESUMED FROM ACCIDENT. — When the loss of property in the hands of a common carrier is caused by an unprecedented flood, amounting to an act of God, and is not due to the failure of any of the appliances of transportation, no presumption of negligence arises from the accident which will cast the burden of proof upon the carrier to show an absence of negligence on his part.

NEGLIGENCE — PRESUMPTION OF, FROM ACCIDENT. — Negligence is not presumed against a common carrier from the mere happening of an accident, when the accident is due to an independent cause, and not to the failure of any of the appliances of transportation.

D. W. Dougherty, for the appellant.

David W. Sellers, for the appellee.

WILLIAMS, J. This is what, under the practice prior to 1887, would have been called an action of trover. It is brought to recover the value of two trunks and their contents, delivered to the defendant company in Cincinnati for transportation to Washington. When the plaintiff presented his baggage-checks at the defendant's station in Washington, and asked for his trunks, they were not delivered. This action was then brought. The course of the trial is shown by the opening paragraph in the printed argument of the appellant. It is as follows: "It was conceded by the defendant that plaintiff's goods were duly received by it, to be forwarded from Cincinnati to Washington; and it was conceded by the plaintiff that the goods were on the day-express, which was destroyed by the flood from the South Fork dam, at Conemaugh, on May 31, 1889." It only remained for the plaintiff to show the value of his goods, in order to complete his case. For the defendant it was necessary to supplement the admission by proof showing that the flood was of such extraordinary character that it was not bound to anticipate or provide

against it, and that it came with such suddenness and power that escape from it was impossible. Several witnesses were called by the defendant for this purpose. They repeated the story of the great rain-storm that preceded the bursting of the South Fork dam; of the rapidly rising river, spreading beyond its banks, and inundating portions of the city of Johnstown; of landslides and other difficulties that beset the movement of trains; of the running of the ill-fated day-express into the yard at Conemaugh for safety and to await orders; and then of the appalling wall of water that came moving down the narrow valley, sweeping away whatever was in its path, trees and dwellings, mills and factories, engines and cars, with a fury that was absolutely resistless. The officers and agents of the defendant at Pittsburgh, and at Johnstown and Conemaugh, on whom the movement of trains depended, were called and testified to the precautions taken to guard against accident to the trains under their control. They told of the information that came to them, of the dangers they knew to exist, and those they apprehended as probable, and what efforts they made to escape them, and secure safety for their passengers, their employees, and the freight with which their cars were laden. It was not denied on the trial, and it could not be upon the evidence before us, that these officers and agents did what they fully believed was the best thing to do, as they understood the situation. Not a witness was called by the plaintiff to testify to any act or omission by the defendant's agents or employees from which want of care could be inferred; but the case was left where the testimony of the defendant's witnesses left it. There was, then, no question of credibility to be settled, and no conflict in the evidence. The case depended on the effect of the admissions and the uncontroverted testimony. The defendant admitted the contract to carry, and the receipt of the goods, and excused the non-delivery by showing their destruction in a flood of such unprecedented character as it could neither be expected to foresee nor provide against. This made a complete defense, and it was proper for the judge to say so; and as no single fact in the series was controverted, it was right for him to direct the verdict.

But the able counsel for the plaintiff insists that in this case there was a legal presumption of negligence in the carrier, that took the question to the jury, under the authority of *Spear v. Philadelphia etc. R. R. Co.*, 119 Pa. St. 61, and kin-

dred cases. We do not think so. Spear was a passenger on board the defendant's boat. After the carriage actually began, an explosion took place on the boat, by which he was injured. The plaintiff proved the happening of the accident to the boat, and the injury to Spear in consequence of it, and rested. This raised a legal presumption of negligence, that entitled the plaintiff to recover. The *onus* was then on the defendant to show affirmatively that the explosion was not due to its want of care in any particular. The case fell within the rule laid down in *Laing v. Colder*, 8 Pa. St. 482, 49 Am. Dec. 533, which is as follows: "The mere happening of an injurious accident to a passenger while in the hands of a carrier will raise a presumption, *prima facie*, of negligence, and cast the *onus* of showing that it did not exist on the carrier." This presumption, it will be noticed, arises, not out of the character of the carrier, but out of the nature of the accident. The injurious accident must be connected with the appliances for transportation which are provided by the carrier, are under its exclusive care and control, and whose condition it is bound to know. If, therefore, the accident complained of happens before the plaintiff has committed himself into the hands of the carrier, the rule does not apply, but the negligence alleged must be proved, as in ordinary cases: *Hayman v. Pennsylvania R. R. Co.*, 118 Pa. St. 509. Nor will the fact that the plaintiff has put himself into the hands of the carrier be sufficient to raise the legal presumption of negligence, unless the accident from which he suffers is connected with the appliances of transportation: *Pennsylvania R. R. Co. v. MacKinney*, 124 Pa. St. 462; 10 Am. St. Rep. 601. In the case just cited, MacKinney was a passenger on board one of defendant's trains, which was moving at a high rate of speed. A piece of coal came through the open window of the car, near which he sat, and struck him in the face. There was no failure of or accident to any of the appliances of transportation, but an injury to an individual passenger from an independent and unrelated cause; and we held that the rule of *Laing v. Colder*, 8 Pa. St. 482, 49 Am. Dec. 533, did not apply. The same principle controls this case. The accident by which plaintiff's baggage was lost was not due to the failure of any of the appliances of transportation, but to an independent cause, — the flood, — which involved the car and the baggage it contained in a common ruin. The flood was, as to the defendant, an inevitable accident, properly described as

actus Dei. In such a case negligence is not presumed, but must be proved, as any other fact necessary to the plaintiff's recovery.

In this case, when the contract to carry was shown, it became the duty of the carrier to excuse its non-performance. The loss of the trunks by the flood from the South Fork dam was admitted. This accounted for their non-delivery, and it was only necessary to show the character of the flood, and that the loss of the train was not due to want of care on its part in the management of its business, in order to make a complete defense. Let us see what the defendant's evidence does show. It shows, first, that the damage apprehended by the servants and employees of the defendant were those naturally resulting from the continued and heavy rainfall. It shows, next, constant telegraphic communication between those charged with directing the movement of trains and local agents and trainmen along the line, and the exercise of great care in the management and movement of trains in the valley of the Conemaugh, in order to avoid the dangers known to exist, or likely to be encountered. In the third place, it shows the care exercised over this particular train, and that it was moved into the yard at Conemaugh because that was a place of absolute safety from any flood that there was reason to anticipate, and was a convenient place at which to reach it with orders. Finally, it shows that while the train was thus carefully disposed of, and safe from any known danger, it was suddenly overwhelmed by the deluge from the broken dam, and destroyed so utterly that no vestige of the car or the baggage has since been found. This made a defense that meets the requirements of the rule as to the burden of proof resting on a carrier in every particular. It shows the loss, by inevitable accident, of the trunks sued for; and it shows that the loss was not made possible by the negligence of the defendant, but happened in spite of the utmost care exercised by agents and employees to escape the dangers it knew to exist, or had reasonable ground to apprehend.

It may be possible for us, looking back coolly and in the clear light of history on that terrible catastrophe, to see how property and life might have been saved if men on the ground had realized the awful magnitude of the impending calamity. It was not realized. The inhabitants of the populous valley sat in their homes or went about their business while the deluge was approaching. So swift was its approach, that the

horseman running to warn the city was overtaken and swallowed up, and the flood fell unannounced, and swept the day-express and the city of Johnstown before it. What was done on that day must be considered in the light of what was then known, and what, from such knowledge, it was reasonable to apprehend. So considered, the defense was complete. There was no question of fact for a jury to decide, and it was exactly right for the learned judge to tell them so, and to direct their verdict: *Moore v. Philadelphia etc. R. R. Co.*, 108 Pa. St. 349; *Delaware etc. R. R. Co. v. Cadow*, 120 Pa. St. 559; 6 Am. St. Rep. 730; *Pennsylvania R. R. Co. v. Bell*, 122 Pa. St. 58.

The assignments of error are not sustained, and the judgment is affirmed.

COMMON CARRIERS, LIABILITY OF — ACT OF GOD. — A common carrier is not liable for injury to goods in his possession caused by an unprecedented flood in a river, which came on so suddenly that it could not have been anticipated by human knowledge or foresight, nor the injury prevented by the exercise of reasonable diligence: *Smith v. Western R'y*, 91 Ala. 455; 24 Am. St. Rep. 929; *Blythe v. Denver etc. R'y Co.*, 15 Col. 333; 22 Am. St. Rep. 403 (a case of accident caused by a gale of wind). As to the liability of carriers, where the accident is caused by an "act of God," but the carrier is not free from negligence, see cases in the note to *Norris v. Savannah etc. R'y Co.*, 11 Am. St. Rep. 363, 364; and compare *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and *Richmond etc. R. R. Co. v. Benson*, 86 Ga. 203; 22 Am. St. Rep. 446.

COMMON CARRIERS. — PRESUMPTION OF NEGLIGENCE FROM ACCIDENTS: See note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495, where a large number of cases are cited to the effect that a presumption of negligence arises from an accident. Later cases to the same point are *Furnish v. Missouri Pac. R'y Co.*, 102 Mo. 438; 22 Am. St. Rep. 781; *Louisville etc. R'y Co. v. Hendricks*, 128 Ind. 462. As stated in the note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 494, some cases qualify the rule by confining the instances in which a presumption of negligence arises to those in which the carrier has control of the appliances which cause the accident. This view was adopted in *Hawkins v. Front Street etc. R'y Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, in which it was laid down that the fact that a passenger on a cable-car in a city is injured without fault of his own does not raise a presumption of negligence, casting the burden of proof on the railway company to disprove it, — the accident in that case being caused by a collision with a wagon. As most, if not all, the precedents cited for this doctrine involved cases of injuries to passengers, and as the liability of the carriers of goods is so much more extensive than that of carriers of passengers, there seems to be room for doubt whether the rules of evidence which are applicable where a passenger is injured can properly be adopted for the purpose of determining upon which side the burden of proof lies, where goods are lost or damaged. It would appear that the principle upon which this non-presumption of negligence in the cases referred to is based is, that the carrier cannot justly be made liable for accidents caused by persons or objects which he has neither

he right nor the power to control. As an ordinary test of legal responsibility in cases of tort, this principle is, of course, beyond impeachment. But whether it is properly applicable to cases of liability arising out of a contractual relation, the essence of which is that the contractor is an "insurer" of the property under his charge, seems not a little questionable. A carrier of passengers is bound to exercise a very high degree of care, but in other respects his liability for injuries is not different from that of any ordinary individual in the transactions of every-day life. On the other hand, the law declares that, for reasons of public policy, a carrier of goods must keep the goods safe against all perils, except those arising from the act of God or the public enemy. This rule is so far from limiting his responsibility to cases in which the loss or injury has occurred through the defects of his appliances or the fault of his employees, that it would obviously leave him liable in many cases in which accidents have happened without the slightest fault on his part, and from causes over which he could not have possibly exercised any control. The force of these considerations will be apparent when it is remembered that, according to numerous authorities, even the fact that the loss was caused by the act of God will not always absolve the carrier: See notes to *Wolf v. American Exp. Co.*, 97 Am. Dec. 408-411; *Norris v. Savannah etc. R'y Co.*, 11 Am. St. Rep. 363, 364. If the law holds the carrier of goods liable not merely for accidents occurring through ordinary causes which are beyond his control, but, in certain cases, even for accidents occurring from the most extraordinary and exceptional events, it would appear more consistent with principle to say that he cannot escape his liability as insurer until he has brought the case by positive and conclusive evidence within the exceptions which the law allows. In other words, since it must appear that his own negligence was not a concurring cause of the accident, by placing the goods in such a position as to be subjected to the overwhelming force which destroyed them, there is, we think, considerable reason for requiring that he assume the *onus* of proving that he was not negligent. Under the facts of the principal case, there would obviously have been no difficulty in establishing this freedom from negligence, and the decision would not have been affected by adopting the rule of evidence condemned by the court. But circumstances may readily be conceived in which it would be a great hardship to throw the burden of proving negligence upon the plaintiff. Such a rule, in fact, is open to the objection of ignoring the consideration upon which the severe doctrine as to the liability of carriers is based, viz., that, in the nature of the case, it must often be impossible for the shipper to furnish the necessary positive evidence that the carrier is in fault. The principle that the carrier is not excused, unless the act of God is not only the cause, but the sole cause, of an accident, seems to involve as a corollary the further principle, that the burden of proof should be on him to show that the act of God is actually the sole cause. In states in which proof that the act of God caused the accident is a conclusive defense, whether there was concurring negligence or not, these considerations would have no weight. But, under such circumstances, it seems unnecessary to draw any such distinction as that made by the court in the principal case, between accidents caused by the appliances which are under the carrier's control and by external causes. If the plaintiff is not allowed to recover, even if he establishes negligence on the part of the carrier, any inquiry as to the burden of proof is superfluous. Such a doctrine leaves neither need nor room for further evidence, and as it seems to be the accepted doctrine in Pennsylvania (see *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695), we venture to

think the ruling in the principal case might have been rested solely upon the fact that, under the previous decisions of the court, it was immaterial whether the defendant was negligent or not. The flood being the immediate cause of the accident, there was no necessity for investigating any concurrent and more remote causes.

DONLEY v. CITY OF PITTSBURGH.

[147 PENNSYLVANIA STATE, 348.]

CONSTITUTIONAL LAW — POWER TO ENACT REMEDIAL LEGISLATION IN RESPECT TO STREET-WORK. — When street-improvement work has been done under a void statute, and the property owners have received the benefits, a subsequent statute providing for the levy and collection of assessments to pay for such work, thus legalizing what the state might previously have ordered, is constitutional and valid.

Johns McCleave, J. M. Swearingen, and C. A. O'Brien, for the appellants.

D. T. Watson, W. C. Moreland, and T. D. Carnahan, for the appellee.

PER CURIAM. The hearing of this cause was advanced, with the others involving similar questions, for public reasons, and was argued at the present term in the eastern district.

The plaintiffs owned a lot on South Twenty-eighth Street, in the city of Pittsburgh, which had been assessed for street improvements under what is known as the remedial act of May 16, 1891 (P. L. 71). It is claimed that this act is unconstitutional, and this is the only question in the case.

The street improvements in question were made under the authority of the acts of June 14, 1887 (P. L. 386), and May 16, 1889 (P. L. 228). The decision of this court in *Wyoming Street*, 137 Pa. St. 494, and in *Pittsburgh's Petition*, 138 Pa. St. 401, held that the said acts of 1887 and 1889 were unconstitutional. This left the city of Pittsburgh without the power to collect from the owners of abutting property the cost of the street improvements completed and in course of construction. It was to remedy this difficulty that the said act of May 16, 1891, was passed.

It was urged that this act does not apply, because the improvements in question were made under void acts of assembly, and without any authority whatever. If they had been made under competent authority, or a valid act of assembly, there would have been no need of this curative legislation.

ne work having been done under void authority, and the property owners having received the benefits of the street improvements, the legislature had the clear right to legalize what might previously have ordered. That the legislature has the power to pass such remedial legislation is settled by abundant authority: *Satterlee v. Matthewson*, 16 Serg. & R. 169; *Richenley v. Commonwealth*, 36 Pa. St. 29; 78 Am. Dec. 359; *Commonwealth v. Marshall*, 69 Pa. St. 328; *Hewitt's Appeal*, 88 Pa. St. 55; *Harrisburg v. McCormick*, 129 Pa. St. 214; *Chester City v. Black*, 132 Pa. St. 569.

It was urged, however, that even if the act applies, it is unconstitutional by reason of a defect in the title. We find nothing in any of our cases to sustain this contention. It would be difficult to frame an act with a more comprehensive title, unless the title is made an index to the act itself, which we have repeatedly held not to be necessary. We have examined the act, section by section, with great care, and do not find any objectionable features. We do not think it necessary to discuss it in detail. It is a general act, applying to all cities in the commonwealth, and the propriety of some such act was plainly foreshadowed in the opinion of this court in the case of *Pittsburgh's Petition*, 138 Pa. St. 401.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants.

STATUTES — RETROSPECTIVE AND CURATIVE ACTS. — As to what laws are retroactive, and when they may be constitutionally enacted, see note to *Boston v. Cummins*, 60 Am. Dec. 726. The general rule is, that a retrospective act is constitutional, if it neither takes away a vested right of property nor dissolves the obligation of a contract: *Aldridge v. Tusculumbia etc. R. R. Co.*, 2 Stew. & P. 199; 23 Am. Dec. 307; *Rawls v. Doe*, 23 Ala. 240; 58 Am. Dec. 289; *Henderson etc. R. R. Co. v. Dickerson*, 17 B. Mon. 173; 66 Am. Dec. 148; *Drehman v. Stifel*, 41 Mo. 184; 97 Am. Dec. 268. For examples of curative acts held valid, see *Richman v. Supervisors*, 77 Iowa, 513; 14 Am. St. Rep. 308, and cases cited in note. As to retrospective statutes curing defects in legal proceedings, see note to *State v. Torinus*, 37 Am. Rep. 397-399. The legislature may, by a subsequent statute, cure a mere irregularity in a proceeding, if it could have dispensed with it by a prior statute; but it has no power, by a subsequent curative statute, to remedy a jurisdictional defect, or one which goes to the substance of a vested right: *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182. But a statute retrospective as well as prospective in its operation, legalizing the sole deeds of married women executed in good faith after the judgment of divorce in certain cases, although defective service of process may have rendered the judgment invalid in fact for want of jurisdiction, is valid and constitutional, and such deed, executed in a case provided for by the statute, conveys a good title: *Wistar v. Foster*, 46 Minn.

484; 24 Am. St. Rep. 241. An act that removes an impediment, and allows a contract to be enforced, although retrospective, is not unconstitutional: *Bleakney v. Farmers' etc. Bank*, 17 Serg. & R. 64; 17 Am. Dec. 635. See further, note to *Whitney v. Pittsburgh*, *infra*.

WHITNEY v. CITY OF PITTSBURGH.

[147 PENNSYLVANIA STATE, 351.]

**CONSTITUTIONAL LAW — REMEDIAL LEGISLATION IN RESPECT TO STREET-
WORK.** — When street-improvement work has been done under a void statute, and the property owners have received the benefit, a subsequent statute providing for the payment for the work by assessment, and broad enough in its terms to cure such defects as a failure to secure the consent of a majority of such property owners, as required by the void act, and the inclusion in the proceedings of the contract for the setting of curbstones, thus legalizing what the state might previously have ordered, is constitutional and valid.

Johns McCleave, J. M. Swearingen, and C. A. O'Brien, for the appellant.

D. T. Watson, W. C. Moreland, T. D. Carnahan, and J. H. White, for the appellees.

PER CURIAM. The bill filed in this case is similar in many respects to the one in *Donley v. City of Pittsburgh*, 147 Pa. St. 848; *ante*, p. 738. It includes, however, the contractors employed by the city, and has reference to the grading, paving, and curbing of Centre Avenue from Soho Street to Highland Avenue. It also avers that section 11 of the act of April 1, 1868 (P. L. 567), required a petition of the owners of a majority in interest of property abutting on the street before such an improvement could be made in that territory, and that no such petition was obtained. It also avers that, under the acts just referred to, the city was precluded from including in the ordinance and contract the setting of curbstones.

Assuming these objections to be well taken, we are of opinion that the act of 1891 is broad enough in its terms to cure these defects. The most that can be said is, that the work referred to was done without lawful authority, and this is the defect which the act was intended to cure.

The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

STATUTES. — REMEDIAL LEGISLATION: See note to *Donley v. City of Pittsburgh*, *ante*, p. 739. Legislative acts validating invalid contracts are constitutional, — such acts, that is to say, as go no further than to bind a party

by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law: *Town of Bellevue v. Peacock*, 89 Ky. 495; 25 Am. St. Rep. 552; citing with approval *Hasbrouck v. Milwaukee*, 13 Wis. 37; 80 Am. Dec. 718. The same case shows, also, that this rule is not applicable, except to the original contracting parties, and such others as may have succeeded to their rights with no greater equities.

VALLO v. UNITED STATES EXPRESS COMPANY.

[147 PENNSYLVANIA STATE, 404.]

STREETS — RIGHT TO USE SIDEWALK FOR BUSINESS PURPOSES. — Occupants of places of business upon a public street have a right to use the sidewalk in front of their premises in receiving and sending out merchandise, but they must exercise this right with a due regard to the safety of pedestrians; and what is such reasonable length of time as such persons may allow their property to remain upon the sidewalk without incurring the charge of negligence is for the jury to decide under the circumstances of each particular case.

NEGLIGENCE — PROXIMATE CAUSE — SUDDEN PERIL. — When a person passing along a sidewalk in a city is so suddenly put in peril by seeing a trunk pitched toward him from defendant's delivery wagon as to leave no time for consideration of the way of escape, and under the circumstances it is natural for him to instinctively retreat in the direction of an obstruction placed upon the sidewalk by defendant, and having his eye fixed upon the danger from which he is fleeing, he falls over such obstruction, the negligent throwing of the trunk is the proximate cause of the injury.

NEGLIGENCE — SUDDEN PERIL — PROXIMATE CAUSE. — When a person has been put in sudden peril by the negligent act of another, and in an instinctive effort to escape from that peril falls upon another, the negligent act is the proximate cause of the injury, and it is immaterial that under different circumstances he might and ought to have seen and avoided the latter danger.

CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY. — When a person passing along a sidewalk in a city observes a trunk suddenly pitched toward him from defendant's delivery wagon, and in seeking to avoid being struck by the flying trunk, moves toward the center of the sidewalk, keeping his eye on the trunk, and in so doing falls over another trunk, placed upon the sidewalk by defendant, thus sustaining injuries for which he seeks to recover, the question of his contributory negligence in the matter is for the jury to determine.

NEGLIGENCE — DUTY OF PERSON INJURED TO EMPLOY PHYSICIAN. — A person injured by the negligence of another is not unqualifiedly bound to engage medical aid and attendance for such length of time as his injuries make necessary; but if a man of ordinary prudence would have engaged such aid and attendance more promptly than the injured party did, his delay in this regard may be taken into consideration, and compensation may be denied for damages which might have been so averted.

TRESPASS for personal injury. Judgment for plaintiff; defendant appealed.

John F. Keator and Charles L. Smyth, for the appellant.

John F. Lewis and Francis C. Adler, for the appellee.

HEYDRICK, J. The right of occupants of places of business upon a public street to use the sidewalk in front of their premises in receiving and sending out merchandise is not questioned. But the law imposes upon such persons, as it does upon all others using the sidewalk for any other lawful purpose, the duty to exercise their right with a due regard to the safety of pedestrians, or, as was in substance said by the learned trial judge, in a reasonable manner: *Commonwealth v. Passmore*, 1 Serg. & R. 219; *Welsh v. Wilson*, 101 N. Y. 254; 54 Am. Rep. 698. What is a reasonable manner must always depend upon the circumstances. It might, and doubtless would, be unsafe to leave such an obstruction as was described in this case unguarded for a single moment upon a sidewalk near a railway station, thronged by people rushing to and from trains, while no inconvenience might be apprehended from leaving the same obstruction several hours upon a less frequented street. Hence it is impossible to lay down any precise rule as to the length of time a person may allow his property to remain upon a highway without incurring the charge of negligence.

But the negligence of the defendant, if any existed, consisted not alone in leaving a trunk, or small iron safe, upon the sidewalk five minutes more or less. If the plaintiff be believed, he was passing along one of the principal thoroughfares of the city of Philadelphia in the evening of July 6, 1889, between the center of the sidewalk and the curb, and when he came opposite the defendant's premises, its servants suddenly pitched a trunk out of its delivery wagon towards him. To avoid being struck by the flying trunk, he moved towards the center of the sidewalk, "keeping his eye upon the trunk while it was coming," and in so doing fell over another trunk, and thereby sustained the injuries for which he seeks compensation.

Whether the trunk was suddenly, and without warning, thrown out of the delivery wagon at such time and in such manner as to imperil the plaintiff was a controverted question of fact which could be determined only by the jury. If it was so thrown, the defendants were clearly guilty of negligence, for

no man may innocently hurl a projectile across a highway upon which people are constantly passing.

It is, however, contended, that inasmuch as the plaintiff escaped injury from the trunk thus recklessly thrown from the wagon, the negligence of the defendant is, at most, only the remote cause of the injury. This contention raises the question whether the plaintiff was so suddenly put in peril as to leave no time for consideration of the way of escape, and whether, under the circumstances, it was natural and probable that he would instinctively retreat in the direction of the obstruction placed by the defendant upon the sidewalk, and having his eye fixed upon the danger from which he was fleeing, fall over that obstruction. If such was the natural and probable course of events, the negligent throwing of the trunk was the proximate cause of the injury: *Pittsburgh Street R'y Co. v. Taylor*, 104 Pa. St. 306; 49 Am. Rep. 580. But whether that natural and continuous sequence of events which is necessary to fix responsibility for an injury upon the author of a negligent act has been proved is ordinarily a question for a jury: *Milwaukee etc. R'y Co. v. Kellogg*, 94 U. S. 469; *Ehrgott v. Mayor of New York*, 96 N. Y. 264; 48 Am. Rep. 622; and there is nothing in this case to make it an exception to the general rule.

Assuming, as we must, that the jury found that by reason of the sequence of events already mentioned, the negligent throwing of the trunk was the proximate cause of the plaintiff's injury, the question of contributory negligence is necessarily eliminated. That finding involves not only the negligence of the defendant, but a consequent peril, so suddenly precipitated upon the plaintiff as to leave no time for voluntary action. Under such circumstances, it is believed no person has ever been held guilty of contributory negligence because he did not choose the best way of escape from the impending danger. On the contrary, the principle to be extracted from numerous cases in this and other states is, that when a person has been put in sudden peril by the negligent act of another, and in an instinctive effort to escape from that peril falls upon another, it is immaterial whether, under different circumstances he might and ought to have seen and avoided the latter danger. This being the settled law, it is difficult to understand why greater circumspection in the presence of a danger that could not be anticipated should be

required of a man having but one eye than from the less unfortunate.

By its sixth point the defendant requested the court below to charge the jury that the plaintiff was unqualifiedly bound to engage medical aid and attention for such length of time as his injuries made necessary. To have so charged would have been manifest error. It would have required the plaintiff to have exercised greater care in mitigating the consequences of an injury already inflicted than the law requires in the first instance to avoid the injury. The utmost the defendant could with propriety have asked was, that if a man of ordinary prudence would under the like circumstances have engaged medical aid and attention more promptly than the plaintiff did, his delay in that regard should be taken into consideration, and no compensation allowed for any damages that might have been so averted. But as no such instruction was asked, we are not called upon to express an opinion as to whether it ought to have been given.

The fifth assignment of error was not pressed. As to the sixth and seventh assignments, it is enough to say that the only remedy for an excessive verdict is a motion for a new trial, and that the refusal of such trial is not assignable as error.

The judgment is affirmed.

PAXSON, C. J. (dissenting). I am of opinion that the plaintiff was negligent, and that the defendant was not. The case was this: The defendant's employees were unloading an express wagon in front of its office on Chestnut Street. The plaintiff alleges that one of the men was about to throw a trunk upon the pavement, but there is no allegation that he was struck or in danger of being struck by it. While watching this operation, he stumbled over a small express safe lying on the pavement. This occurred in the full blaze of an electric light. This accident was, in my opinion, plainly the result of his own negligence, and fully justified the remark of a person who was passing at the time: "That man would fall over a house." For the reasons thus briefly stated, I dissent from this judgment.

HIGHWAYS, RIGHT OF ABUTTING OWNER TO USE OF. — Right of owner of land abutting on public highway to use a portion of highway in a reasonable manner for special purposes is not subservient to the right of the traveling public, and its exercise without negligence imposes no liability: *North Mannheim Township v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 650.

NEGLIGENCE — ACTS DONE IN AN EMERGENCY. — The law does not require that a person who is surprised or confused by a sudden danger should act or be judged according to any fixed rule: *Duane v. Chicago etc. R'y Co.*, 72 Wis. 523; 7 Am. St. Rep. 879; *Southwest Improvement Co. v. Smith*, 85 Va. 306; 17 Am. St. Rep. 59. But the rule that a person in a position of danger is not responsible for a mistake of judgment in getting out of it, is subject to the qualification that he must have got into danger without negligence or fault of his own: *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380; 17 Am. St. Rep. 775.

CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE JURY. — If the circumstances are such that reasonable minds might draw different conclusions, the plaintiff is entitled to go to the jury upon the facts: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804; *Nugent v. Boston etc. R. R.*, 80 Me. 62; 6 Am. St. Rep. 151; *Weber v. Kansas City Cable R'y Co.*, 100 Mo. 194; 18 Am. St. Rep. 541; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; 18 Am. St. Rep. 441; *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note citing many cases; *Roux v. Blodgett etc. Lumber Co.*, 85 Mich. 519; 24 Am. St. Rep. 102; *Roddy v. Missouri Pacific R'y Co.*, 104 Mo. 234; 24 Am. St. Rep. 333; *Mathews v. Cedar Rapids*, 80 Iowa, 459; 20 Am. St. Rep. 436.

CONTRIBUTORY NEGLIGENCE — REJECTION OF MEDICAL ADVICE. — Where death has been occasioned by negligence, the administrator of the decedent cannot be precluded from recovering, as a matter of law, because he rejected the advice of his physician, and refused to submit his limb to amputation, when it appears that the question of whether the death was due to the rejection of such advice was properly submitted to the jury, and answered by their verdict in favor of the plaintiff: *Sullivan v. Tioga R'y Co.*, 112 N. Y. 643; 8 Am. St. Rep. 793.

WAGNER v. JAYNE CHEMICAL COMPANY.

[117 PENNSYLVANIA STATE, 475.]

MASTER AND SERVANT — RISKS ASSUMED BY SERVANT. — An employee will be deemed to have assumed all risks naturally and reasonably incident to his employment, and to have notice of all risks which, to a person of his experience and understanding, are, or ought to be, open and obvious.

MASTER AND SERVANT — RISKS OF EMPLOYMENT — FUMES OF NITRIC ACID. — There is nothing in the employment of a common laborer that presupposes any scientific knowledge of the property of acids, or that poisonous fumes are likely to be evolved in a manufacturing process in which nitric acid is used, although such fumes are perceptible to the senses. Hence it is not presumed that such laborer either possesses or professes such knowledge, and without some such previous knowledge, the danger from exposure to such fumes is not open and obvious, and such laborer cannot be deemed to have assumed such risk, unknown to him, though naturally and reasonably incident to his employment.

MASTER AND SERVANT — DUTY OF MASTER TO PROVIDE FOR AND WARN SERVANT. — An employer is bound to exercise reasonable precaution against injury to his employees, while in his service and obeying his

orders. He must provide suitable instruments and means with which to carry on the business which he sets them to do, and must warn them of all dangers to which they will be exposed in the course of their employment, except those which the employee may be deemed to have foreseen as necessarily incidental to his employment, or which may be open and obvious to a person of his experience and understanding, or such as the employer cannot be deemed to have foreseen.

MASTER AND SERVANT. — EMPLOYER WILL BE PRESUMED TO BE FAMILIAR WITH DANGERS, latent as well as patent, ordinarily accompanying the business in which he is engaged.

MASTER AND SERVANT — RISK OF EMPLOYMENT — NEGLIGENCE, WHIPP QUESTION OF FACT. — When, in an action to recover for injuries sustained by inhaling fumes of nitric acid, the proof shows that plaintiff was employed as an outside common laborer, but was ordered by his employer to do inside work in connection with a manufacturing process in which nitric acid was used, evolving poisonous fumes, of which defendant had knowledge and had warned other workmen, but the evidence is conflicting as to whether or not plaintiff's injury could have been caused by such fumes, and as to whether or not he knew or had been warned that they were dangerous, the question of negligence, both on the part of plaintiff and defendant, should be submitted to the jury for determination.

MASTER AND SERVANT — RISKS OF EMPLOYMENT. — When a servant, suspecting a danger not necessarily incident to his employment, complains thereof to his master, who assures him that he is in no danger, he has a right to rely upon that assurance; and if he is subsequently injured by the danger complained of, he cannot be deemed to be guilty of contributory negligence.

Silas W. Pettit and John R. Read, for the appellant.

John G. Johnson, Lincoln L. Eyre, and B. F. Hughes, for the appellee.

HEYDRICK, J. The several assignments of error in this case, except the fourth, raise the question whether there was any evidence which ought to have been submitted to the jury.

According to the appellant's statement, it is engaged in the manufacture of a dye-stuff called dinitro-benzole, which is made by putting liquid nitro-benzole into a receiver, and pouring nitric acid and sulphuric acid into it and mixing them, in which process heat is produced by chemical action. The liquid is then allowed to cool, when the dinitro-benzole settles to the bottom, and is separated from the acids as far as practicable and then subjected to another process in which heat is mechanically applied.

The testimony on the part of the plaintiff, if believed, showed that he was a common laborer; that he had been employed by the defendant occasionally, prior to the injury complained of, to do such work, outside of the establishment, as

unloading boats, hauling barrels, and digging; that on the 29th of August, 1889, he was re-employed and set to work at some common labor as before, but soon after ordered to do some work in connection with the process of making dinitro-benzole; that poisonous fumes were evolved by that process, which he inhaled; that, experiencing discomfort therefrom, he left the work, declaring that he "could not stand it"; that the defendant's superintendent assured him that the fumes would not hurt him, and ordered him to return to his work; that, relying upon the superintendent's assurance, he obeyed his order, but in a few hours became so sick that he was obliged to go home, and was thereafter under a physician's care several months; and that he had no previous knowledge of the dangers to which he was exposed, and was not warned of them by his employer. The testimony of his physician, as well as that of three experts called by him, strongly tended to show that his sickness was the result of inhaling the fumes evolved in the manufacture of dinitro-benzole. There was also testimony tending to show that the defendant knew that these fumes were poisonous, and had previously so warned at least one other workman.

It is a well-settled rule of law that an employee will be deemed to have assumed all the risks naturally and reasonably incident to his employment, and to have notice of all risks which, to a person of his experience and understanding, are, or ought to be, open and obvious. This is a reasonable rule; for when a man seeks employment in any particular department of either industrial or intellectual activity, he thereby represents himself to be qualified by the necessary experience or learning, as the case may be, for the performance of the duties which he proposes to assume, and such experience or learning necessarily brings a knowledge of the ordinary risks of the employment. Thus one who holds himself out as a physician is deemed to thereby represent that he possesses such learning and skill as to reasonably qualify him for the duties of his profession; and that learning will teach him the danger of exposure to contagious and infectious diseases. But when the reason of the rule fails, the rule itself ceases to have any application. And, therefore, while the physician would have no ground of complaint if his health should be permanently impaired by reason of exposure, at the call of a patient, to a contagious or infectious disease, he might recover damages for the slightest injury suffered in consequence of a defect in

the floor of the house which he was invited to enter, unknown to him, but which was known, or ought to have been known, to his patron; and this because there is nothing in the science of medicine, in which he professes to be learned, to affect him with notice of the latter danger. Neither is there anything in the employment of a common laborer that presupposes any scientific knowledge, such as a knowledge of the properties of acids, or that poisonous fumes are likely to be evolved in a manufacturing process in which nitric acid is used; and for that reason the law does not presume that such laborer either possesses or professes such knowledge. And although some of the work required to be done in the manufacture of dinitrobenzole may be mere drudgery, it cannot be said to be of such ordinary character in its surroundings as to justify a presumption that a common laborer has, by experience, acquired a knowledge of its attendant dangers. Without some such previous knowledge, either scientific or experimental, the dangers, if any there be, of exposure to the fumes of nitric acid would not be open and obvious, and the laborer could not with propriety be deemed to have assumed such risks, unknown to him, as are naturally and reasonably incident to his employment: *Rummell v. Dilworth*, 111 Pa. St. 343.

On the other hand, it is equally well settled that an employer is bound to exercise reasonable precaution against injury to his employees while they are in his service and obeying his orders. Not only must he provide suitable implements and means with which to carry on the business which he sets them to do, but he must warn them of all the dangers to which they will be exposed in the course of their employment, except those which the employee may be deemed to have foreseen as necessarily incidental to the employment in which he engages, or which may be open and obvious to a person of his experience and understanding, and except, also, such as the employer cannot be deemed to have foreseen. And the employer will be presumed to be familiar with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged. Authorities upon these points may be found in great abundance in the notes to sections 185-203 of *Shearman and Redfield on Negligence*.

Keeping these principles in mind, it will be seen that the learned court below could not have given binding instructions to the jury to find for the defendant without committing grave error. There was testimony of witnesses,

apparently entitled to the highest respect, tending to show, on the one hand, that the fumes of nitric acid are poisonous, and on the other hand, that they are not. That the question thus raised was, if material, properly submitted to the jury cannot be doubted. That it was material is shown by the sharpness of the contention over it; for if learned gentlemen who have made it the subject of special study and investigation cannot agree whether it be injurious to the human system to inhale such fumes, it cannot be that the danger of exposure to them is so open and obvious to a common laborer that he should be deemed to have voluntarily assumed the risk as one incident to his employment. There was also evidence, possibly open to criticism, but which could not be withheld from the jury, tending to show that the defendant had knowledge of the dangerous character of the nitric acid fumes.

The evidence of contributory negligence coming from the plaintiff was not sufficient to justify the court in directing a verdict against him. It does not appear that when he quit work, saying, "I can't stand this," he knew, or had reason to believe, that the fumes would do him permanent injury. When the superintendent assured him that they would not hurt him, he had a right to rely on that assurance, and return to his work: *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 393. In *Beittenmiller v. Bergner etc. Brewing Co.*, 22 Week. Not. Cas. 33, upon which the defendant relies, the plaintiff knew the danger to which he was exposed; he had tested it, and retreated from it. The superintendent did not tell him that ammonia would not hurt him, but, when directing him to return to work, impliedly admitted the danger, by saying that the ammonia was not then so bad. The statement was not true, and the moment the plaintiff entered the room, that fact must have been so obvious that it could not escape the attention of the dullest person, and therefore when he continued his work he assumed the risk.

The fact that the fumes of nitric acid may be perceptible to the senses is conclusive of nothing. The court could not say, as matter of law, that every odor is a warning of danger.

The judgment is affirmed.

MASTER AND SERVANT—ASSUMPTION OF RISKS BY SERVANT. — A servant of sufficient age and intelligence to understand the nature of the risks to which he is exposed assumes, for compensation, the natural, ordinary, and apparent risks and perils incident to the employment: *Wormell v. Maine*

Central R. R. Co., 79 Me. 397; 1 Am. St. Rep. 321; and also such other risks as become apparent by ordinary observation: *Kean v. Detroit etc. Rolling Mills*, 66 Mich. 277; 11 Am. St. Rep. 492. Unusual and unreasonable risks are not assumed, unless open and visible, and known to and comprehended by the employee: *Nadau v. White River L. Co.*, 76 Wis. 120; 20 Am. St. Rep. 29; and where the danger to be avoided requires a knowledge of scientific facts, or is the result of well-known chemical combinations among well-educated men, and the danger is known to the employer, or should be known by him, the employer will be responsible to the servant for an injury resulting therefrom, if he neglects to notify the servant thereof: *Smith v. Peninsular Car Works*, 60 Mich. 501; 1 Am. St. Rep. 542. As to the effect of the master's promise to remove the source of danger upon the servant's right to recover, see extended note to *Gulf etc. R'y Co. v. Brentford*, 23 Am. St. Rep. 335-388.

MASTER AND SERVANT — DUTY OF MASTER TO WARN SERVANT OF DANGER. — Master must notify servant of special risks, in the employment of which the latter is not cognizant, or which are not patent; and on failure of such notice, the servant, exercising due care and receiving injury, is entitled to recover, when the master knew, or ought to have known, of such risks: *Wormell v. Maine Central R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; unless the danger is so apparent that the servant will be bound to take notice of it: *Louisville etc. R'y Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432; *Myhan v. Louisiana etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436. This obligation is especially incumbent on the master, when the servant is inexperienced: *Smith v. Peninsular Car Works*, 60 Mich. 501; 1 Am. St. Rep. 542; *Ross v. Walker*, 139 Pa. St. 42; 23 Am. St. Rep. 160; *Gates v. State*, 128 N. Y. 221; as, for example, where an employee, who has previously been acting in the capacity of a common laborer, is put in charge of dangerous machinery: *Brasil Block etc. Co. v. Gaffney*, 119 Ind. 455; 12 Am. St. Rep. 422. See, generally, notes to *Smith v. Peninsular Car Works*, 1 Am. St. Rep. 548-550, and *McDonald v. Chicago etc. R'y Co.*, 16 Am. St. Rep. 715-717.

MASTER AND SERVANT — RIGHT OF SERVANT TO RELY ON EXERCISE OF CARE BY MASTER. — A servant has a right to rely on the judgment and discretion of his master, and to assume that he will fully perform his duty towards him: *Little Rock etc. R'y Co. v. Leverett*, 48 Ark. 333; 3 Am. St. Rep. 230; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256; *Myhan v. Louisiana etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436. He need not set up his own judgment against that of his superiors, but may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180. See also the extended note on this subject which is appended to *Shortel v. St. Joseph*, 24 Am. St. Rep. 320-323.

**GERMAN-AMERICAN TITLE AND TRUST COMPANY v.
SHALLCROSS.**

[147 PENNSYLVANIA STATE, 485.]

JUDGMENT IN EQUITABLE EJECTMENT IS CONCLUSIVE NOT ONLY as to the title of the land in suit, but it has all the conclusiveness of a decree in chancery as to every other matter litigated in that action.

JUDGMENT — EVIDENCE TO SHOW WHAT WAS LITIGATED. — When the record of a judgment in equitable ejectment is general, extrinsic evidence is admissible to prove what particular matters were litigated.

JUDGMENT IN EQUITABLE EJECTMENT — EVIDENCE AS TO MATTERS LITIGATED. — On the trial of a bill in equity to compel the satisfaction of a mortgage and judgment and the extinguishment of ground-rent, extrinsic evidence is admissible to prove that in a prior action of equitable ejectment between the same parties the defendant was given credit for such mortgage, judgment, and ground-rent, if the judgment therein is so general as not to show what particular matters were litigated.

JURISDICTION TO COMPEL SATISFACTION OF MORTGAGE. — In an action of equitable ejectment, the common-law side of the court has no jurisdiction to compel the defendant therein to satisfy a mortgage for which he has received credit. The only remedy is by bill in equity.

BILL in equity by the German-American Title and Trust Company, as committee of F. Mawhinney, against Ida V. Shallcross and Lewis Stover, executors of Lewis Shallcross, to compel the satisfaction of certain mortgages and a judgment, and extinguishment of ground-rents. Mawhinney's land was about to be sold at sheriff's sale to satisfy a judgment against him, when Lewis Shallcross advised him to let the sale go on, promising to purchase the property for him. This Shallcross did, thus obtaining the legal title for a nominal sum. Mawhinney also executed certain mortgages on the land to Shallcross, who also held assignments for the ground-rents thereon. Mawhinney then brought an action of equitable ejectment against Shallcross for the land, and recovered a verdict and judgment, conditioned that he pay to the latter the sum of \$2,293.02. He paid Shallcross the amount of such verdict, and was put into possession of the land, but Shallcross refused to satisfy the judgment and mortgages of record, or to extinguish the ground-rents, and threatened to proceed upon the same and enforce payment thereof. Hence this bill, praying that defendants be restrained from transferring said mortgages, ground-rents, and judgment, and from maintaining any proceeding thereunder, and for a decree ordering defendants to satisfy said judgment and mortgages of record, and execute deeds of extinguishment for said ground-rents. Bill dismissed. Plaintiff appealed.

William H. Staake, for the appellant.

Lewis Stover, for the appellees.

HEYDRICK, J. At a very early date resort was had, in Pennsylvania, to the action of ejectment as a remedy for the enforcement of equitable rights in respect to real estate. This was a necessity, as has been frequently said, growing out of the want of a court of chancery, or the possession by the common-law courts of such equitable jurisdiction as has since been conferred upon them. But although it was broadly declared in *Peebles v. Reading*, 8 Serg. & R. 484, that wherever chancery would execute a trust or decree a conveyance, the courts of this state, by the instrumentality of a jury, would direct a recovery in ejectment, it was not until the announcement of the judgment in *Seitzinger v. Ridgway*, 9 Watts, 496, that the true character of the action when employed as an equitable remedy was fully understood. The point actually decided in the latter case was, that one verdict and judgment in an equitable ejectment was conclusive as to the title, but the reasoning upon which that decision was based proved that such judgment has all the conclusiveness of a decree in chancery as to every other matter litigated. This is a legitimate result of the substitution of the common-law action for a bill in equity.

Now, if Francis Mawhinney, instead of bringing his action of ejectment in the common pleas No. 1 of Philadelphia, had filed a bill in equity, averring that when his property was about to be sold by the sheriff he applied to Shallcross for counsel and assistance; that Shallcross advised him to let the sale go on, and promised to purchase the property for him; that, relying upon such advice and promise, he made no further effort to save it, but permitted Shallcross to obtain the legal title for a nominal sum; and that the rents and profits had reimbursed Shallcross for his outlay and trouble; and if the latter had answered, admitting all the averments of the bill, except that he had been fully reimbursed, and averring that he had paid out in ease of the estate moneys in excess of the rents received,—it cannot be doubted that it would have been decreed, among other things, that an account be taken of the rents so received, and of the moneys so paid out, and that the balance, whichever way it might have been found, would have been decreed to be paid by the party against whom it was found to the other. And it is as little to be doubted that the decree

so made would have been alike conclusive as to the rents received and as to amounts paid out in ease of the estate, so that neither party could in any future action call the other to account in respect to any of the matters so adjudicated. To state this proposition is to call to mind the rule tersely expressed by Chief Justice De Grey in *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 784, in respect to the conclusiveness of judgments as evidence, because the decree as to the balance would have been directly upon the amount of rents received and the amount of money paid out. And it could not have affected the conclusiveness of the decree in this respect if the defendant had ineffectually denied the trust, to enforce which the suit was brought, and at the same time averred the expenditure of money for the benefit of the estate. Such denial might have cost him the loss of credit for all betterments, at least, if the cause had been decided by a chancellor less benevolent than the learned judge before whom the ejectment was tried, as may be inferred from *Bleakley's Appeal*, 66 Pa. St. 187; *a fortiori* it could not have put him in a better position in respect to the matters litigated than he would have occupied if he had frankly admitted the trust.

Now, what might have been done in the equity side of the court is precisely what was accomplished by the action of ejectment. The record does not indeed show that the sum adjudged to be paid by the plaintiff to the defendant as a condition precedent to the recovery of the land was the result of an accounting in respect to the rents received and disbursements made by the defendant, as it would have shown if the proceeding had been by bill in equity. But this is immaterial; for whenever a record is general, — that is to say, when it does not show what particular matters were litigated, — it is competent to show by extrinsic evidence what those matters were: *Meyers v. Hill*, 46 Pa. St. 9; *Treftz v. Pitts*, 74 Pa. St. 343. This was done in the present case, and the master found that the defendant gave in evidence, at the trial of the ejectment, the several bonds, mortgages, and ground-rents which are the subject of the present controversy "for the purpose of receiving credit therefor in the amount of the conditional verdict in case the jury should decide the main issue in favor of the plaintiff." He could not have found otherwise from the evidence before him. The testimony of Judge Biddle, before whom the cause was tried, of Mr. Dougherty, who was counsel for the plaintiff, of the plaintiff's son, and of several of the

jurors, and the stenographic report of the former trial, prove beyond controversy that the defendant not only gave them bonds, mortgages, and ground-rents in evidence, but that he presented to, and under the direction of the court sent out with, the jury a "statement of the cost of the properties," in which the mortgages and ground-rents were included, along with such other items as purchase-money paid to the sheriff, taxes, and improvements, and that the trial judge instructed the jury that they should give the defendant credit for the different sums included therein, if they found for the plaintiff as to the land. The jury having found "for the plaintiff on his tendering to Shallcross the sum of \$2,293.02," it is further significant of what was thereby adjudicated that there does not appear to have been any evidence to justify the condition annexed to the verdict, except the statement referred to, and the evidence by which it was verified; that no distinction was made in the statement or charge of the court between the mortgages and ground-rents, and the other items of "the cost of the properties"; and that when the defendant offered in evidence an assignment to himself of the ground-rents, he expressly offered it as "an extinguishment" of the ground-rent. The conclusion is therefore irresistible, that the defendant elected to treat the ground-rents and mortgages as merged in the legal estate acquired by him at the sheriff's sale, and claim the money invested in them as so much money paid out by him in ease of the estate which he would be entitled to recover before he should be required to restore possession to his *cestui que trust*. The verdict and judgment in the action of ejectment must therefore be treated as an adjudication that the ground-rents and mortgages were merged, and that there was due to the defendant from the plaintiff the sum of \$2,293.02 as the result of an accounting in respect to the rents received and the several items contained in the plaintiff's "statement of the cost of the properties." The plaintiff having paid that sum, it was the duty of the defendant to satisfy the mortgages of record, and execute and deliver deeds of extinguishment of the ground-rents. But the common-law side of the court has no appropriate process by which it can enforce such duty, and hence the discharge of the rule granted in the ejectment suit for that purpose was conclusive of nothing. This bill was the proper remedy: *Trefitz v. King*, 74 Pa. St. 350.

The liability of the defendant to account in this suit for the

rents received by him subsequent to the trial of the ejectment not being controverted, the finding of the master upon that branch of the case requires no discussion.

The decree of the court below is reversed, at the costs of the appellee; the bill of the plaintiff is reinstated, and the record is remitted, with instructions to the court below to enter a decree granting the relief recommended by the master.

JUDGMENT, CONCLUSIVENESS OF. — Before a judgment in one action can operate as a bar to another, it must appear by the record or by extrinsic evidence that the precise question involved in the second action was raised and determined in the first: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436. When a judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit, or by evidence *aliunde* consistent therewith, that it was between the same parties, and that the particular controversy sought to be concluded was necessarily tried and determined: *Haines v. Flinn*, 26 Neb. 380; 18 Am. St. Rep. 785. A judgment is conclusive, not only as to the subject-matter of the suit, but as to all other suits, which, though concerning other subject-matter, involve the same question as that in controversy: *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71; and as to every other matter which the parties might have litigated as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered: *Denver City Irr. etc. Co. v. Middaugh*, 12 Col. 434; 13 Am. St. Rep. 234; *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301; *Lorillard v. Clyde*, 122 N. Y. 41; 19 Am. St. Rep. 470. Nor is it necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purposes of estoppel, deemed to have been actually decided: *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71. Thus where, in a former suit, in which an issue was raised as to the validity of a deed of trust as a lien on certain land, the decree rendered, ascertained, and adjudged the several specific interests of the parties in such a manner as, in effect, to eliminate the lien of the deed of trust, the decree is conclusive as to the extinguishment of the lien: *Nave v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421. As to the conclusiveness of a judgment in ejectment, see note to *Caperton v. Schmidt*, 85 Am. Dec. 208-211.

JUDGMENTS, PAROL EVIDENCE AS TO. — Parol evidence is admissible, when a judgment is general, to show what has been tried and determined thereby: *Estill v. Taul*, 2 Yerg. 466; 24 Am. Dec. 498; *Warwick v. Underwood*, 3 Head, 238; 75 Am. Dec. 767; *Doty v. Brown*, 4 N. Y. 71; 53 Am. Dec. 350; *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603; *Black v. Miller*, 75 Mich. 323; *Buckingham's Appeal*, 60 Conn. 143. Thus when a judgment entered upon an oral agreement to compromise fails to embody the agreement, or to recite that it was rendered in accordance with an agreement, parol evidence of such oral agreement is admissible in a suit to recover damages for a breach of the compromise contract: *East Line etc. R. R. Co. v. Scott*, 72 Tex. 70; 13 Am. St. Rep. 758. Where, however, a decree did not show the facts upon which it was based, but the opinion of the court stated them, it was held that the opinion was inadmissible as not being in itself evidence: *Buckingham's Appeal*, 60 Conn. 143.

MADISON v. PENNSYLVANIA RAILROAD COMPANY.

[147 PENNSYLVANIA STATE, 509.]

MALICIOUS PROSECUTION — WANT OF MALICE. — Plaintiff in malicious prosecution is not entitled to recover when his own evidence shows that his arrest was caused by the police alone, and for the purpose of discovering the perpetrators of a series of crimes against the defendant, thus showing an entire want of malice on the part of the latter.

MALICIOUS PROSECUTION — WANT OF MALICE. — Defendant in an action for malicious prosecution is not liable when the inference of malice drawn from the presumption of want of probable cause, arising from the discharge of the plaintiff by a magistrate, is disproved by plaintiff's evidence showing an entire absence of malice.

MALICIOUS PROSECUTION — INFERENCE OF MALICE FROM WANT OF PROBABLE CAUSE — BURDEN OF PROOF. — Evidence by a plaintiff in malicious prosecution of his arrest, and of his subsequent discharge by a magistrate, raises a presumption of want of probable cause, from which an inference of malice may be drawn. The burden is then on the defendant to disprove malice, unless its absence is disclosed by the further evidence offered by the plaintiff.

MALICIOUS PROSECUTION. — **INFERENCE OF MALICE** cannot be drawn, in an action for malicious prosecution, from mere want of probable cause, when other circumstances disclose an entire absence of malice.

MALICIOUS prosecution. Defendant asked that the jury be instructed that, — "7. Under all the evidence in the case, the verdict should be for the defendant." This was refused. Judgment for plaintiff; defendant appealed.

J. H. Barnes and G. T. Bispham, for the appellant.

T. Diehl and J. A. Scanlan, for the appellee.

MITCHELL, J. When the plaintiff's own testimony was closed, he had shown an arrest, and a discharge by the magistrate. The discharge raised a presumption of want of probable cause, and from want of probable cause the jury were at liberty to infer malice. But plaintiff had not yet shown any connection of the defendant with his arrest, and to make out his case in that respect, he called Howell, and in showing the authority of the defendant for the prosecution, this witness also showed the circumstances, which were a series of robberies of the defendant's cars in West Philadelphia for something over a year, the investigation first started by the police authorities of the city, reported by them to the defendant, by it referred to the witness as its proper officer, and by him put in the charge of one of his subordinates (upon whose affidavit the arrest was subsequently made), with instructions to consult the defendant's counsel, and to act with the city

authorities, the police and the district attorney. The arrest was not of a stranger, totally disconnected with the circumstances, but of an employee of the railroad, who had, during part of the time, been engaged upon the branch and in the business where the robberies were taking place.

This was the case as it stood at the close of the evidence on behalf of the plaintiff, and, as already said, the discharge raised a presumption of want of probable cause, from which, if it stood unexplained, the jury would be at liberty to infer malice. Although only an inference from a presumption, it is ordinarily enough to carry the case to the jury, and put on the defendant the burden of showing probable cause or disproving malice. But it was not alone and unexplained. The circumstances clearly showed absence of malice. The crime was of very high magnitude, a series of systematic and organized robberies, involving not only great loss of property, but suspicion and injury to the character of every employee on that branch of the railroad. The investigation was begun by the police, and was prosecuted under their direction. The public purpose of discovery of criminals and vindication of justice is apparent on the face of the whole proceeding. As was said in *Emerson v. Cochran*, 111 Pa. St. 622, "a jury ought not to be permitted to infer malice from the mere want of probable cause, when, by other circumstances, it is disproved."

Public policy and the demands of public justice cannot permit a jury to punish a prosecutor for proceeding under circumstances such as disclosed in this case. It is doubtless a hardship for plaintiff, an innocent man, to be subjected to arrest and imprisonment. But that is an inevitable occasional result of living in a civilized and orderly community. Some concession to public interests and some sacrifice of individual rights are part of the foundation on which society is supported.

The evidence on the part of the defendant strengthened and made conclusive the absence of malice, besides showing probable cause, but we have not thought it worth while to go into that part of the case. The plaintiff's case was defective in itself, because it carried with it an explanation of the circumstances, which fully rebutted the inference of malice, which might have been drawn from the discharge unexplained.

The defendant's seventh point should have been affirmed.
Judgment reversed.

MALICIOUS PROSECUTION: See, generally, notes to *Williams v. Huxter*, 14 Am. Dec. 599-603; *Dennis v. Ryan*, 22 Am. Rep. 639-644; and *Ross v. Hixon*, 26 Am. St. Rep. 127-164. As to the liability of corporations for malicious prosecution, see note to *Williams v. Planters' Ins. Co.*, 34 Am. Rep. 495-499. Want of probable cause in itself raises a presumption of malice: *Brand v. Hinchman*, 68 Mich. 590; 11 Am. St. Rep. 37; but the inference may be rebutted by proof that the prosecutor, though not able to show probable cause, instituted the prosecution under an honest belief of plaintiff's guilt, provided such belief was founded on facts and circumstances sufficient to produce in the mind of a prudent and reasonable man such belief of plaintiff's guilt as to repel the idea that the prosecutor was actuated by malice: *Lunsford v. Dietrich*, 86 Ala. 250; 11 Am. St. Rep. 37. Nor is a defendant in malicious prosecution liable as principal, if, acting on knowledge communicated to him by his agent, he institutes a criminal prosecution in good faith, with due caution, believing that the offense has been committed, and acting upon grounds which justify that belief: *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489. Probable cause consists of a belief in the facts or charge alleged, based on sufficient circumstances to reasonably induce such belief in the mind of a person of ordinary prudence in the same situation: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322. But malice and want of probable cause must conjoin, to render actionable the misuse or abuse of legal process in the common-law or ordinary remedies: *Eslava v. Jones*, 83 Ala. 139; 3 Am. St. Rep. 699; *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. 174; *Cooper v. Hart*, 147 Pa. St. 594; and the mere fact that defendant began the prosecution without knowledge of sufficient facts to create probable cause is not enough to fix his liability: *Threefoot v. Nuckols*, 68 Miss. 116. Malice may be inferred from want of probable cause, and from the voluntary dismissal of the suit; but such inference is one of fact, to be drawn by the jury under proper instructions: *Smith v. Burrus*, 106 Mo. 94; 27 Am. St. Rep. 329. A verdict of acquittal is not sufficient evidence of want of probable cause: *Grant v. Deuel*, 3 Rob. (La.) 17; 38 Am. Dec. 228; *Bitting v. Ten Eyck*, 82 Ind. 421; 42 Am. Rep. 505; *Williams v. Vanmeter*, 8 Mo. 339; 41 Am. Dec. 644; *Griffin v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85. And the same rule holds where a *nolle prosequi* has been entered: *Yokum v. Polly*, 1 B. Mon. 358; 36 Am. Dec. 583; or the prosecution abandoned: *Cockfield v. Braveboy*, 2 McMull. 270; 39 Am. Dec. 123. But a judgment of a justice of the peace, discharging the accused, is *prima facie* evidence of want of probable cause: *Bigelow v. Sickles*, 80 Wis. 98; 27 Am. St. Rep. 25; even though there may be testimony tending to show that the justice was inclined to hold the plaintiff to bail, but discharged her upon her representation that she had no friends and could not give bail, and upon her promise not to molest the defendant further. Such a determination is sufficient to enable the plaintiff, upon proof of the other requisite facts, to maintain the action: *Robbins v. Robbins*, 133 N. Y. 597.

MALICIOUS PROSECUTION. — BURDEN OF PROOF: See note to *Ross v. Hixon*, 26 Am. St. Rep. 153.

BOYERTOWN NATIONAL BANK v. HARTMAN.

[147 PENNSYLVANIA STATE, 558.]

DEEDS — REFORMATION OF, FOR MISTAKE. — EVIDENCE SUFFICIENT TO REFORM A DEED on the ground of mistake must be clear, precise, and indubitable, and of such weight and directness as to establish the facts alleged beyond a reasonable doubt.

DEEDS — REFORMATION OF, FOR MISTAKE — EVIDENCE INSUFFICIENT TO JUSTIFY. — When a wife's name is mentioned in the recitals of a deed as a party thereto, but she is neither named nor referred to in the granting or operative clauses of the deed, where the name of her husband alone appears, and the proof shows that the party drawing the deed was instructed to make it to the husband and wife jointly, but a mortgage of the same date recites that the husband is the sole owner of the land, the evidence is not sufficiently clear and certain to reform the deed on the ground that the name of the wife was omitted therefrom by mistake, and that it was intended to convey the land to the husband and wife jointly.

DEED TO HUSBAND AND WIFE JOINTLY. — When a conveyance is made to husband and wife jointly, a purchaser of the husband's interest takes nothing during the life of the wife, and not even at her death, if the husband predeceases her.

ACTION to recover possession of real estate. The opinion states the facts, except that the evidence tended to show that the scrivener who drafted the deed in dispute was instructed to make both Hartman and his wife grantees therein, and that Hartman executed a mortgage to the property, of even date with the deed, in which he was recited as sole owner of the land. Judgment for plaintiff, and defendants appealed.

John F. Smith and Jeremiah K. Grant, for the appellants.

Ermentrout and Ruhl, for the appellee.

STERRETT, J. In October, 1890, the land in controversy was sold as the property of the defendant John Hartman, and duly conveyed by the sheriff to the plaintiff. For the purpose of showing title in said Hartman at time of sale, plaintiff gave in evidence deed of Jacob Bahr and wife, dated April 4, 1878. It is conceded that if John Hartman was sole vendee in fee under that conveyance, plaintiff was entitled to recover. It appears, however, from an inspection of the deed, that John Hartman and Susan, his wife, are named as parties of the second part thereto, but in all the operative clauses of the deed the conveyance is to "John Hartman, his heirs and assigns," alone, and the covenant of special warranty is in same form. The name of Susan Hartman nowhere appears in the deed, except in the first clause, to wit: "This indenture

made between John B. Bahr, of and Catharine, his wife, of the first part, and John Hartman, of the same place, and Susan, his wife, of the other part."

On the face of the deed, therefore, John Hartman was the sole owner of the land when it was taken in execution and sold as his property to the plaintiff. But the defendants contended that in point of fact the conveyance was to them as husband and wife jointly; that by a mistake of the scrivener the name of the wife was omitted from the conveying and other operative clauses of the deed; and that the instrument should be reformed so as to make it conform to the intention of the parties. They therefore assumed the burden of making the proof necessary to justify a chancellor in thus reforming the deed. If they had succeeded in so doing, they would have established the fact that they were both seised of the entirety, each equally entitled to possession of the whole, with all the incidents of the peculiar estate created by a conveyance to husband and wife, one of which is, that the purchaser of the husband's interest takes nothing during the life of the wife, and not even at her death if the husband predeceases her: *Stuckey v. Keefe*, 26 Pa. St. 399; *Bates v. Seely*, 46 Pa. St. 248; *French v. Mehan*, 56 Pa. St. 286; *McCurdy v. Canning*, 64 Pa. St. 39.

Testimony was introduced by the defendants for the purpose of proving that all parties to the transaction intended to convey to John Hartman and wife jointly, and not to him alone; that by a mistake of the scrivener the name of Mrs. Hartman was omitted from all the operative clauses in the deed, etc. In view of this testimony, the court was requested to charge that the evidence was too vague and uncertain to reform the deed, and that the verdict should be in favor of plaintiff; but the learned judge refused to so charge, and submitted the evidence to the jury, with instructions, portions of which are recited in the second specification of error. The verdict was adverse to defendants, and they now complain that the court erred in three particulars:—

1. In construing the deed of Jacob Bahr and wife, April 4, 1878, as a conveyance to John Hartman alone.

This must refer to what was said as to the legal effect of the deed itself, as a conveyance, standing alone, and without the evidence introduced for the purpose of reforming it. Thus understood, the court was clearly right. As we have seen, Mrs. Hartman is neither named nor referred to in the

granting or operative clauses of the deed. Her husband's name alone appears therein. The recognition of Mrs. Hartman in the recital of the parties to the indenture amounts to nothing, in view of the fact that in every other part of the instrument there is a studied avoidance of all reference to her, or any other grantee than her husband. Any other construction than that given by the court below would have been erroneous.

2. The next subject of complaint is the instruction as to the degree of evidence required to reform the deed.

Referring to the oral testimony as to what was said and done when the deed was made, the learned judge instructed the jury, in substance, that if it was the intention of all the parties to make the deed to Mrs. Hartman and her husband jointly, and that the deed was executed upon the representation of the scrivener, and in the belief, on the part of all the parties, that it so disposed of the property, — in other words, that it conveyed the property to them jointly, — “then this deed must be treated precisely as if her name was, throughout, joined with that of her husband. But in order to justify you in finding this to be the truth in the face of the deed, which omits to join the wife in the granting clauses, you must be satisfied of it beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt that the intention was as declared by the witnesses called to prove this allegation, and that it so continued down to and at the precise time when this deed was executed.”

He then read and affirmed plaintiff's second point as “the correct statement of the law,” and thereby instructed the jury in the language thereof, thus: “Where a written instrument is undertaken to be reformed by parol evidence upon the ground of fraud, accident, or mistake, the evidence of the fraud, accident, or mistake must be clear, precise, and indubitable, and must relate to the time when the writing was executed.” In further explanation of the rule, he then said: “The evidence must have clearly satisfied you, gentlemen, not beyond every doubt, for that is impossible, nor yet by a mere preponderance, for that is not sufficient, but as thoroughly as oral testimony can satisfy the mind of the truth of this allegation that the intention of the parties was to make the conveyance to the husband and wife jointly. You must find that the witnesses who were sworn are credible; that they distinctly remember the facts to which they testify; that they

narrate the details exactly; and that their statements are true."

These instructions, as a whole, were as favorable to the defendants as they were entitled to. They are also in harmony with our cases on same general subjects, among which are: *Stine v. Sherk*, 1 Watts & S. 195; *Spencer v. Colt*, 89 Pa. St. 314; *Rowand v. Finney*, 96 Pa. St. 192; *Stewart's Appeal*, 98 Pa. St. 377; *Murray v. New York etc. R. R. Co.*, 103 Pa. St. 37; *Logue's Appeal*, 104 Pa. St. 136; *Ott v. Oyer*, 106 Pa. St. 17; *Phillips v. Meily*, 106 Pa. St. 536; *Sylvius v. Kosek*, 117 Pa. St. 67; 2 Am. St. Rep. 645; *Reno v. Moss*, 120 Pa. St. 49, 67.

In *Ott v. Oyer*, 106 Pa. St. 17, Mr. Justice Trunkey said: "If the evidence produces a clear conviction, without hesitancy, of the truth of the precise facts in issue, it is sufficient. The law does not require proof so convincing as to leave no doubt in the minds of the jurors; it is enough if there be evidence to satisfy an unprejudiced mind beyond reasonable doubt." Other cases are to the same effect. The standard of proof in such cases is "clear, precise, and indubitable." What is meant by "indubitable" proof, in connection with such cases, is, evidence that is not only found to be credible, but of such weight and directness as to make out the facts alleged beyond a reasonable doubt. In the very nature of things, that conclusive and absolute proof which results from the production of record evidence, or rests on the solution of a mathematical problem, can never be the effect of the verbal testimony of witnesses. The language of the authorities must be considered in its relation to the subjects and instrumentalities to which it is applied: *Hart v. Carroll*, 85 Pa. St. 508.

The line of defense above referred to is in the nature of a bill to reform the deed on the ground of mistake. Under our peculiar system of administering equitable principles in common-law actions, the trial judge exercises the functions of a chancellor, and if his conscience is not moved to grant the equitable relief sought, it is his duty to interpose either by withdrawing the case from the jury, or by refusing to enter judgment on a verdict that is not according to equity and good conscience: *Rowand v. Finney*, 96 Pa. St. 192; *Murray v. New York etc. R. R. Co.*, 103 Pa. St. 37. In his opinion, refusing a new trial, the learned judge says: "A careful review of the whole case as presented on the trial has convinced us that it leaves just doubts concerning the essential points of the defense." Our consideration of the evidence relied on by

the defendants has led us to the same conclusion; and we therefore think the court below would have been fully warranted in withdrawing it from the jury by giving binding instructions in favor of plaintiff, as requested in its third point. The same result, however, has been reached by judgment on the verdict. If the verdict had been otherwise, it would have been the duty of the court to set it aside.

There is no merit in the third specification. As bearing on the credibility of the witness John Hartman, the mortgage was rightly admitted. The specifications of error are not sustained.

Judgment affirmed.

DEEDS, REFORMATION OF. — EVIDENCE TO SHOW MISTAKE: See a discussion of the authorities in *Southard v. Curley*, 134 N. Y. 148; *ante*, p. 642, and the additional cases cited in the note thereto.

HUSBAND AND WIFE, CONVEYANCES TO — RIGHTS OF WIFE AS SURVIVOR. — Lands conveyed to husband and wife are held by them as tenants by entireties, as at common law: *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692, and note collecting other cases in the series to the same point. The survivor takes the whole estate: *Brownson v. Hull*, 16 Vt. 309; 42 Am. Dec. 517; *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425; *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471. See also note to *Hulett v. Inlow*, 26 Am. Rep. 65–68. As to the effect of the enabling statutes upon the common-law rule, see note to *Marburg v. Cole*, 83 Am. Rep. 269–271.

RAFFERTY v. CENTRAL TRACTION COMPANY.

[147 PENNSYLVANIA STATE, 579.]

EQUITY PLEADING — PARTIES. — When a cause of complaint is one common to all the plaintiffs, the right under which all claim is precisely the same as to each, the complaint of all is against the same defendant for the doing of acts which affect all alike and in the same manner, the defense set up is common to all the plaintiffs, and the testimony, proofs, and decree are alike as to all of them, a bill filed by several such plaintiffs against a common defendant is not multifarious.

STREET-RAILWAYS — RIGHT TO USE STREET. — Under a statute providing that a street-railway company organized thereunder may lay tracks upon any street upon which “a passenger-railway now is or may hereafter be constructed,” such company may enter and lay tracks upon streets not before occupied by passenger-railways.

STREET-RAILWAYS — RIGHT TO USE STREETS. — POWER TO LEASE AND OPERATE the property and franchises of passenger-railway companies necessarily includes all the franchises, rights, and privileges of the company leased, and among these is, necessarily, such right to occupy streets and lay tracks as the leased company is possessed of.

STREET-RAILWAYS. — TERMS “RAILWAY” AND “RAILROAD” ARE SYNONYMOUS, and have no distinct and independent meaning in themselves. When either is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be deemed applicable to every species of road embraced in the general sense of the word used. Hence general authority to railroad companies to lease their property and franchises will include street-railway as well as steam-railroad companies.

STREETS — STREET-RAILWAYS NOT ADDITIONAL SERVITUDE. — The authorized use of a public street for street-railroad purposes, no matter what the motor power may be, is not the imposition of an additional servitude, and does not entitle the abutting land-owners along the street to compensation for such use.

STREET-RAILWAYS. — RIGHT OF ABUTTING OWNER TO USE OF STREET is the same after car tracks are laid thereon and the cars running as it was before. If, at any time, he has occasion for the presence of vehicles on the street in front of his property, to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purposes, and if, in such exercise of the right, the passage of street-cars is impeded, they must wait.

STREET-RAILWAYS — LIABILITY FOR LEASE OF FRANCHISE — EXCESSIVE EXERCISE OF POWER. — When a street-railway corporation has leased the property and franchises of another railway company, in excess of its lawful authority, it is liable therefor to the state, but not to private persons, unless they have sustained private injury, for which they are entitled to legal redress.

BILL to restrain defendants from operating a cable street-railway on High Street, in the city of Pittsburgh. The bill was filed by six separate owners of property fronting on the street. A demurrer to the bill on the ground of misjoinder of parties was overruled, and defendants required to answer. Judgment for plaintiff, and defendants appealed.

W. A. Stone and P. C. Knox, for the appellants.

George Shiras, C. C. Dickey, and George Shiras, 3d, for the appellee.

GREEN, J. We dismiss the first and second assignments of error, because we think that the cause of complaint is one that is common to all the plaintiffs, the right under which all claim is precisely the same as to each, the complaint of all is against the same defendant for the doing of acts which affected all alike and in the same manner, the defense set up is common to all the plaintiffs, and the testimony, proofs, and decree are alike as to all the plaintiffs. It is not necessary to cite authorities to show that when all these matters concur a bill filed by several such plaintiffs against a common defendant is not multifarious.

On the merits of the case it is not contested that all the powers which the passenger-railway company possessed were conferred upon the traction company by the agreement between the two companies made December 27, 1888. It must also be conceded that the traction company had full power, under the act of 1887, "to lease the property and franchises of passenger-railway companies which they may desire to operate, and to operate said railways," and also "to enter upon any street upon which a passenger-railway now is or may hereafter be constructed, with the consent of said passenger-railway company, and make, construct, maintain, and operate thereon such motors, cables, electrical or other appliances, and the necessary and convenient apparatus and mechanical fixtures, as will provide for the traction of the cars of such passenger-railway, and to enter into contracts with passenger-railway companies to construct and operate motors, cables, or other appliances necessary for the traction of their cars." Under the ample powers and rights conferred by the act of 1887, it cannot be doubted that the defendant company had full power and authority to enter into the contract in question with the Central Passenger Railway Company. The authority of the traction company, however, to do the acts complained of in this case is denied upon two grounds. One is, that the power of the traction company is limited by the act of 1887 to laying tracks upon streets where tracks had already been laid, and therefore no entry for that purpose could be made upon any street in which the tracks of the railway company had never been laid. It is replied to this objection that the railway company had the undoubted right to lay tracks on High Street, under their charter and the city ordinances giving consent. The master so found, and there is no question that his finding on that subject is correct. The first section of the charter authorized the construction of a railway along certain streets named, "and with such branch or branches as the said company may at any time adopt."

At a meeting of the directors of the railway company held December 24, 1888, a resolution was passed, adopting certain branches to the main line, among which was one through High Street, in both directions. By an ordinance of the city councils passed February 6, 1889, authority was given to the railway company to enter upon the several streets named, including High Street, and to construct, maintain, and operate its passenger-railways thereon. By another ordinance of the same

date, the Central Traction Company was authorized to enter, with the consent of the Central Passenger Railway Company, upon any street upon which their railway now is or may hereafter be constructed, for the purpose of constructing, maintaining, and operating in and upon any or all of said streets and avenues, such motors, cables, electrical or other appliances, and such necessary and convenient apparatus and mechanical fixtures as will provide for the traction of cars. We know of no reason to question the legal efficacy of any of these proceedings. The adoption of a branch through High Street was made by the board of directors of the railway company at a meeting regularly held. The ordinances of the city councils were duly enacted by the proper authorities. Everything done was in strict conformity with all legal requirements, and, in our opinion, sufficed to clothe with authority of law all the acts of the several parties done in conformity with those requirements.

On December 27, 1888, a formal contract was entered into between the two companies, by which the railway company agreed that the traction company might enter upon any and all highways on which the tracks of the railway company "now are or hereafter may be constructed, and may there construct, maintain, and operate, during the term of this contract, such motors, cables, electrical or other appliances, and such necessary and convenient apparatus and mechanical fixtures, as will provide for the traction of cars on the track of said passenger-railway company." The contract was to continue during the term of ninety-nine years, and contained other provisions as to details, and required the traction company to pay an annual sum of \$26,250 in consideration for the rights and privileges granted by the contract. If this contract was within the power of the contracting parties to make, we cannot perceive the slightest reason for questioning the good faith or the right of either of the parties to consent to its terms and become bound by them. It is not a matter of the smallest possible consequence whether either or both of the parties found it to their pecuniary advantage to enter into and to execute this engagement. The learned court below found that "the new route probably accommodates more people than the old one did, and the company has given rapid, frequent, and comfortable transportation to the public, in place of the slow, infrequent, and uncomfortable passage of the old passenger-railway."

This being so, the public is a gainer by the transactions of the two companies, and their interests ought not to be sacrificed, except for plain and sufficient reasons.

The learned master was of opinion that because the railway company had not in point of fact laid a track or tracks upon High Street before the tracks were laid there by the traction company, the power to lay them did not exist under the agreement and ordinances, because the act of 1887 under which the defendant company was organized only gave authority to lay tracks upon any street upon which "a passenger-railway now is or may hereafter be constructed." The result of the reasoning of the master would simply be, that if the railway company had first laid tracks on High Street, the traction company could lawfully make the contract in question, and enter upon the street, tear up the tracks previously laid by the railway company, and thereupon proceed to lay the cable tracks. It can hardly be that the question of statutory authority can be made to depend upon such a consideration as that. If it did, it would only be necessary for the traction company to take up its tracks, for the railway company thereupon to lay its tracks, and then for the traction company to take them up and relay its own again. But, in our opinion, there is no occasion to resort to such a subterfuge. The plain meaning of the act is, that if, at the time of its passage, a railway track had already been laid, or if, thereafter, a railway track might legally be laid, by a passenger-railway company, the traction company could contract with the railway company to construct motors, cables, etc., by means of which to run the cars. It would be absurd to say that if the railway company was legally authorized to lay a horse-car track, but had not yet laid it, and desired to lay a cable track, it could not do so without first laying a horse-car track, and then contracting with a cable company to have the latter lay a cable track. If the cable track could lawfully be laid at all, and if the horse-car company had a legal right to lay a horse-car track, and also a legal right to have a cable track laid, instead of a horse-car track, it certainly cannot be that the prior laying and destruction of a horse-car track is a condition precedent to the right to lay a cable track.

The act of 1887 does not require any such strained and unreasonable construction. It is only necessary to read the word "may" before the word "hereafter," in the first section, in its ordinary sense, to understand the propriety of this read-

ing. The master and the learned court below read the word "may" as if it were the word "shall," and inferred that the word was imperative, and implied that the railway track must have been actually laid in advance of the right to contract for a cable track, whereas the word "may" does not necessarily import anything more than that a railway track may be laid,—that is, that there is a right to lay it. There is no doubt that the railway company had the right to lay a track on High Street at the time of the contract, and was not restricted as to the kind of track it should lay. Its power did not depend upon the act of 1887, and it is not possible to understand why the traction company, with a power to contract for the laying of a cable track where a horse-car track was already laid, could not contract to lay a cable track where a horse-car track may be laid. Its right to do so comes within the letter of the act, and it is very plain that the act intended, by the words "or may hereafter be constructed," to enlarge the scope of the powers of the traction companies so as to embrace future development, as well as that which already existed. To hold as the master and the court below held would be to rule that the general powers of the traction companies were restrained by these words, "may hereafter be constructed," whereas they were plainly intended to enlarge them. This idea is confirmed by the concluding words of the first clause of the section, viz., "and to enter into contracts with passenger-railway companies to construct and operate motors, cables, or other appliances necessary for the traction of their cars." These words are general, and confer upon the motor companies the general power to contract with all passenger-railway companies for the construction and operation of motors, cables, and other appliances. No limitation is here placed upon the power to contract to do, practically, the same things which the previous clause of the section provided for. The generality of the construction we have indicated for the first part of the section is also strengthened by the eighth clause, of the powers specifically conferred by the concluding clause of the same section, to wit: "To lease the property and franchises of passenger-railway companies which they may desire to operate, and to operate said railways." Here, also, the power conferred is without any restriction, and embraces all passenger-railway companies. The power to lease and operate the property and franchises of passenger-railway companies necessarily includes all the franchises, rights, and privileges of the company leased,

and among these is, necessarily, such right to occupy streets and lay tracks as the leased company is possessed of. We are therefore of the opinion that the right of the traction company, defendant, to enter into the contract in question in the present case was fully conferred by the act of 1887, and cannot be restrained, as to the laying of tracks, to the laying of tracks only upon such streets as the railway company had already laid tracks upon prior to the making of the contract.

The learned court below went further than the master, and held that the railway company had no power to make such a contract as it did, because the contract was a virtual surrender of all the property and franchises of the company to another corporation, which could only be done under express statutory authority, and such authority, the court held, did not exist as to the Central Passenger Railway Company. To this the defendant company replies that the necessary statutory authority to make the contract in question does exist, and is conferred by the act of February 17, 1870 (P. L. 81). The learned court below admits that, under our decisions in the case of *Hestonville etc. R. R. Co. v. City of Philadelphia*, 89 Pa. St. 210, and *Millvale Borough v. Evergreen Pass. R'y Co.*, 131 Pa. St. 1, the act of 1870 will apply to the Central Passenger Railway Company, but holds that, under the rules of interpretation laid down in *Gyger v. Philadelphia etc. R'y Co.*, 136 Pa. St. 96, the act of 1870 was not intended to, and does not, apply to passenger-railway companies. We do not agree that there is any inconsistency in these several decisions. They, all of them, and especially the last one cited, hold that the terms "railway" and "railroad" are synonymous, and have no distinct and independent meaning in themselves, and that when either of the words is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used. In the *Gyger* case we held that there was very clear indication in the context of section 4, article 17, of the constitution that passenger-railways were not intended to be included in the provisions of that section, and for that reason only we held that street-railway companies were not included within the prohibition of the section. The considerations which led us to that conclusion are fully presented in the opinion, and they are in entire harmony with everything that was said and decided in the other two cases cited.

In the present case those considerations are not applicable, and we are entirely clear, upon the reasoning in all three of the cases, that the act of 1870 does include passenger-railroad companies as well as steam-railroad companies. The language is very general, and embraces all railroads, without distinction. The court below was of opinion that because it included railroads in other states, it could not have been intended to include passenger-railroads in this state. We do not see the force of that inference. The power to contract for railroads in other states is especially given, because it would be necessary to give it by express mention, they being extra-territorial. But, surely, if without that enlargement of the subject-matter the language of the act would embrace passenger-railroads, the extension of the power to embrace railroads out of the state cannot operate to cut off or exclude passenger-railroads within the state by mere implication. The words which extend the contracting power to roads out of the state are words of enlargement of power, not of restriction upon powers already granted by the act, and we cannot give them such meaning by mere intendment.

Another objection is made to the application of the act of 1870, because no continuous connection is made between the road of the passenger company and any road of the traction company, and under the proviso of the act such connection is necessary before the act can operate. This raises a question, not of construction of the act, but whether companies seeking to make use of it have brought themselves within its terms.

As the traction company has no road of its own, there is much plausibility in this contention, but yet the question still remains, whether the plaintiffs are in a position to sustain their bill on this ground. If they have no interest arising from a remediable injury, it is difficult to understand how they can invoke the aid of the law to correct an excessive exercise of power by making the lease or contract in question. If they have done that, they are responsible to the commonwealth, but not to a private citizen who has sustained no special injury for which he is entitled to redress. It has been many times held, and by many different courts, that the use of a public street for purposes of street-railroads is not the imposition of an additional servitude, and does not entitle the abutting land-owners along the street to compensation for such use. In the case of *Lockhart v. Craig Street*

R'y Co., 139 Pa. St. 419, we affirmed the lower court in the following ruling: "It cannot be doubted at this day that the legislature of Pennsylvania has the power to authorize the incorporation of companies with power to build and operate railways with horses over the streets of cities, with the authority and consent of the authorities of said cities, as provided by section 9, article 17, of the constitution. And it is too late to say that such use and occupation of the streets impose such an additional burden or servitude thereon as renders it necessary to provide for compensation therefor to the owners of abutting property. . . . So far as the street use proper is concerned, there is no substantial difference between the tracks of such a street-railway and one operated by electricity. . . . And it may be now taken as settled that the owner's rights as to abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, such as the public may from time to time require. . . . Recognizing the right of the legislature and city authorities to authorize the building of railways upon the streets of a city, without compensation to property owners, because it is a means of public transportation and accommodation, the necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in its construction or use."

In *Halsey v. Rapid Transit Street R'y Co.*, 47 N. J. Eq. 380, it was held that land taken for a street is taken for all time, and compensation is made once for all, and by the taking the public acquire the right to use it for travel, not only by such means as were in use when the land was acquired, but by such other means as new wants and the improvements of the age may render necessary; and that the question whether a new method of using the street for public travel results in the imposition of an additional burden on the land or not must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. It was also held that the erection of poles in the center of the street and on the sidewalk in front of the plaintiff's property, with connecting wires, for the purpose of applying electricity as a motive power to propel street-cars, was not imposing an additional servitude upon the street, and that the owner had no cause of action.

In *Williams v. City Electric Street R'y Co.*, 41 Fed. Rep.

556, the court said: "The operation of a street-railroad by mechanical power, when authorized by law, on a public street, is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is, therefore, not a taking of private property, but is a modern and improved use of the street as a public highway, and affords to the abutting property holder, though he may own the fee of the street, no legal ground of complaint."

In the case of *Briggs v. Lewiston etc. R. R. Co.*, 79 Me. 363, 1 Am. St. Rep. 316, the court said: "We do not think the construction and operation of a street-railroad in a street is a new and different use of the land from its use as a highway. The modes of using a highway, strictly as a highway, are almost innumerable, and they vary and widen with the progress of the community. . . . The laying down rails in the street, and the running street-cars over them for the accommodation of persons desiring to travel on the street, is only a later mode of using the land as a way, using it for the very purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. . . . We do not think the motor is the criterion. . . . This defendant company is using the land as a street. Its railroad is a street-railroad. Its cars are used by those who wish to pass from place to place on the street. A change in the motor is not a change in the use."

All of this is strictly applicable to the facts of the present case. High Street was a public street of the city before the defendant's tracks were laid, and it is so still. Whether the motive power of the cars be horses, electricity, or a submerged cable makes no difference in the use, and no one of these modes of use confers any right of action upon the abutting owner.

In *Taggart v. Newport Street R'y Co.*, 16 R. I. 668, it was also held that a street-railway operated by electricity imposed no new servitude upon the property owner, although poles and wires were erected in the street in connection with the railway. Laying a street-car track so close to the sidewalk that vehicles cannot stand gives no ground for action: *Kellinger v. Forty-second Street etc. R. R. Co.*, 50 N. Y. 206.

It is claimed for the plaintiffs that their right of free access to their property along High Street is interfered with, because vehicles cannot stand between the railway tracks and the curbing without interfering with the cars. But the right of the

property owner in this respect is not at all changed. He has the same right after the tracks are laid and the cars running that he had before. It is a right which must be exercised in reason, whether there are car tracks on the street or not. In no circumstances does it confer the privilege of obstruction by unreasonable exercise. But the reasonable exercise of the right gives no right to the street-car companies to arrest it. If, at any time, the owner has occasion for the presence of vehicles in front of his property on the street, to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purposes, and if, in such exercise of the right, the passage of street-cars is impeded, the street-cars must wait. Such stoppage of cars is a matter of hourly occurrence in all large towns and cities, where street-car tracks are laid upon narrow streets, and it was proved on the hearing before the master that not only in Pittsburgh and Allegheny, but in Philadelphia, there are numerous instances of this kind. It was also proved that in actual fact there had been no trouble of this kind on High Street since the cars were running; but the important question is as to the existence of the right of the owner, and not as to its abuse by either the street-car company or the owner. For such abuse by the company on the one hand, or the owner on the other, each is responsible, and each has adequate remedy. These principles are sustained by abundant authority, and they are the teachings of common sense. The same is true respecting the right of access to the pipes and mains lying under the surface of the street. Some of them were lowered slightly by the defendant company to make room for the conduit for their cables, and the connections were restored by the company. The right of future access to those pipes and mains by the owner remains precisely the same as it was before. A slight difference in the depth to which the owner must go upon the very rare occasions when he may desire to make repairs or new connections is so very trivial that it must be regarded as *damnum absque injuria*. If for any reason, such as change of grade by the municipal authorities, or to get below the frost, the pipes and mains require to be lowered, it certainly has never been supposed that the owners would have a right to recover damages against the municipality or other authority on account of such lowering of the pipes and mains.

We do not at all agree with the learned court below that the occupation of the street by the tracks and motors of the de-

defendant has diminished the value of the plaintiffs' properties from one third to one half. The testimony to that effect was chiefly the interested testimony of the plaintiffs themselves, and was matter of opinion only, fortified by no actual facts. It was admitted by two of them that there was no change in the rental value of their properties, and that is as fair an actual test of market value as can ordinarily be shown. Other testimony was to the effect that there was no decrease of value in the properties, and this opinion was supported by instances of property sales in other localities, where similar conditions existed. This subject, however, is not controlling, and is only alluded to because it was made the subject of a distinct finding by the learned court below, which we think was not justified by the testimony.

Upon the whole case, and a review of all the testimony, we are of opinion that the traction company had ample authority, under the act of 1887, to make the contract with the passenger-railway company, and that whether the latter company exceeded its lawful authority by becoming a party to the contract is a question of the excessive exercise of power by a corporation, for which it is amenable to the commonwealth, but not to a private suitor, unless he has sustained a private injury, for which he has legal redress. We hold that these plaintiffs have not sustained such injury, and therefore have no standing to maintain their bill. We think, however, that, in view of all the circumstances, the costs should not be imposed upon the plaintiffs, but should be borne by the defendant.

The decree of the court below is reversed, and the bill of the plaintiffs and all proceedings thereunder are dismissed and set aside, but all the costs of the case shall be paid by the defendant.

EQUITY PLEADING — MULTIFARIOUSNESS. — Unconnected parties may unite in a suit, if there is one connected interest among them all, centering in the point in issue in the case: *Fellows v. Fellows*, 4 Cow. 682; 15 Am. Dec. 412, and note as to rules for determining what bills are multifarious. A bill is not multifarious which unites two good causes arising out of the same transaction, all the defendants being interested in the same claim of right, and relief of the same general character being asked in relation to each: *Varick v. Smith*, 5 Paige, 137; 28 Am. Dec. 417; nor is one in which all the complainants are creditors of the same party, and seeking to subject the same fund to their claims: *Comstock v. Rayford*, 1 Smedes & M. 423; 40 Am. Dec. 132.

STATUTES, INTERPRETATION OF. — MEANINGS OF THE WORD "MAY": See note to *Malcolm v. Rogers*, 15 Am. Dec. 467, 468. The word "may" or the words "shall be lawful," used in a statute, are mandatory, wherever the act to be done under a statute is to be done by a public officer, and either concerns the public interest or affects the rights of third persons: *Ex parte Simonton*, 9 Port. 390; 33 Am. Dec. 320. "May" will be construed as synonymous with "shall," where the public or third persons have a claim *de jure* that the power shall be exercised; but where this is not the case, "may" will not be construed as "shall": *Bansemmer v. Mace*, 18 Ind. 27; 81 Am. Dec. 344. So the word "may" is equivalent to "shall," in a statute providing that affidavits for use in any court within the state "may be taken" by justices of the peace: *People v. Brooks*, 1 Denio, 457; 43 Am. Dec. 704. The signification ascribed by the court in the principal case to the word "may" can scarcely, we venture to think, be correct. In the phrase "now is or hereafter may be constructed," there is a clear and direct opposition between existing conditions and future possibilities. The essential words are obviously "now" and "hereafter," and a construction which proceeds upon the assumption that "may" implies power, right, or privilege leaves the antithesis imperfect, and operates so that the clauses are no longer properly complementary to each other. To admit the proposed interpretation, it would be necessary to assume that one of the commonest of statutory and legal phrases has been used in an unfamiliar manner, for which the learned judge has adduced no precedent or authority of any kind; for, certainly, the mere fact that "may" often has the meaning ascribed to it, raises no very strong presumption that it must have that meaning, when combined with other words in what may almost be termed a stereotyped phrase of well-understood import. The essential point in such cases is, not what the words mean, or may mean, when taken separately, but what they usually mean in the given combination. Nor, it seems to us, was it at all necessary to resort to this rather recondite construction in order to arrive at the conclusion of the court. The opinion might have been made to rest entirely upon the propriety of giving effect to the legislative intent as manifested by the remaining provisions and general tenor of the statute. In construing a statute, the intention of the makers must be regarded, and what is within that intention is within the statute, though not within the letter, while what is within the letter of the statute, but not within the intention of the makers, is not within the statute: *Mayor etc. v. Root*, 8 Md. 95; 63 Am. Dec. 692; *Belleville etc. R. R. Co. v. Gregory*, 15 Ill. 20; 58 Am. Dec. 589, and note collecting other cases in the series; *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819. The reasoning of the learned judge in the subsequent portion of his opinion shows conclusively that the case was eminently one in which it was proper to apply this canon of statutory construction. The intent of the legislature being perfectly manifest, there would appear to be no objection to giving a meaning to the phrase in question which, although disregarding the letter, would follow the spirit of the enactment.

STREET-RAILWAYS NOT AN ADDITIONAL SERVITUDE: See numerous cases cited in the note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 613; *Van Horne v. Newark etc. R'y Co.*, 48 N. J. Eq. 332.

HIGHWAYS — RIGHTS OF ABUTTING OWNERS. — Laying out public streets creates two co-existent rights, — one belonging to the public, to use and improve them for ordinary purposes, the other belonging to the abutting owner, to have access to and from his property over them, and to make such use of

them as is customary and reasonable. Both are valuable, and each is inviolable: *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564. An abutting owner on streets possesses, as an incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and the appurtenant easements and outlying rights constitute private property, of which he cannot be deprived without compensation: *Abendroth v. Manhattan etc. R'y Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461.

RAILROAD COMPANIES. — FORFEITURE OF CORPORATE FRANCHISES can be decreed only at the instance of the state: *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Connecticut etc. R. R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181; *Taggart v. Western Maryland R. R. Co.*, 24 Md. 563; 89 Am. Dec. 760; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84. Acts sufficient to cause a forfeiture of a franchise conferred on a corporation do not *per se* produce a forfeiture; but the corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture, and enforce it: *People v. Los Angeles etc. R'y Co.*, 91 Cal. 338.

DARLINGTON'S ESTATE.

[147 PENNSYLVANIA STATE, 624.]

TRUSTS — CONFIDENTIAL RELATIONS — ATTORNEY AND CLIENT. — When, under the express terms of a letter of attorney, the attorney named therein undertakes the duty to protect his client, his estate, and his best interests, a relation of trust and confidence is created between them, and whatever is thereafter done by the attorney in hostility to the duty and confidence reposed in him is a breach of the trust, which renders the transaction voidable.

TRUSTS ARISING OUT OF CONFIDENTIAL RELATIONS are not confined to any specific association of the parties to them. They extend to and embrace partners and copartners, principal and agent, master and servant, physician and patient, as well as trustee and *cestui que trust*, guardian and ward, parent and child, and husband and wife.

TRUSTS — CLAIM OF TRUSTEE — BURDEN OF PROOF. — When a claim is sought to be established by one holding a fiduciary relation to another, — as attorney and client, — against the person or estate which he is required to protect, the burden of establishing the claim, both as to its fairness and consideration, is upon him in whom the confidence is reposed. He must show fully and clearly that the transaction was the free and intelligent act of his principal, fully explained to him, and this, irrespective of any admixture of deceit, imposition, overreaching, or other positive fraud.

TRUST FROM CONFIDENTIAL RELATION — UNCLE AND NEPHEW — VOID TRANSACTION. — When a man, eighty-three years old, goes to reside with his nephew, conferring upon the latter, by letter of attorney, full power to manage his estate, worth about nine thousand dollars, and a few months thereafter gives the nephew his note for seven thousand dollars, in consideration for past services, and care during the remainder of his life, such note is void, in the absence of affirmative proof by the benefi-

diary of past services rendered, or a contract for future maintenance, and that the maker was fully informed of the contents of the note, the effect to result from his signing it, what proportion of his estate would be required to pay it, and the amount remaining to pay legacies provided for in his will.

William M. Hayes, for the appellant.

Alfred P. Reid, for the appellees.

GREEN, J. The instrument, the validity of which is called in question in this contention, is a promissory note. It is a note for seven thousand dollars, which was given by the testator, Caleb Darlington, to his nephew, Joseph H. Darlington, on the 6th of November, 1889, payable six months after date. There was no money consideration for the note. Three daughters of Joseph H. Darlington testified that at the time the note was signed they were present and heard Caleb Darlington say that it was given for past services, and for taking care of him during the rest of his life. At the time of his death, in December, 1890, Caleb Darlington was about eighty-five years of age; consequently he was about eighty-four years old when the note was signed. The daughters of the payee testified that the note was already filled up when it was produced by their father, and that Caleb Darlington then signed it and handed it to their father, the payee. The auditor finds that it was in July, 1889, when Caleb Darlington went to live with his nephew, and he remained there until his death in December, 1890, during which time he was cared for by Joseph H. Darlington and his family. The auditor further finds that on the 19th of July, 1889, the testator executed a letter of attorney to Joseph H. Darlington, giving him power to transact all his business, to collect all moneys due or to become due to him, and to disburse the same in payment of debts and obligations, and concluding with the following clause: "I authorize and empower him to do whatever shall to him seem proper for the protection of myself and my estate, and I hereby ratify and confirm whatsoever my said attorney may do, in his discretion, in relieving me of all care and responsibility, and in discharging whatever duties he may see proper to perform, which, in his judgment, may be for my best interests." Under this letter of attorney, Joseph H. Darlington proceeded to collect moneys due to his principal on different securities owned by the latter, and continued doing so until, as the auditor finds, he had received \$2,137.74, which he still

held at the death of Caleb Darlington. It does not appear that he reinvested any of the money or paid any of it over to his principal. When the seven-thousand-dollar note was obtained from Caleb Darlington, November 6, 1889, the latter had been living less than four months with his nephew, and in that same time, according to the testimony of David McFarland, Joseph H. Darlington had collected about nine hundred dollars of his uncle's money.

The daughters of the nephew did not testify to any negotiations between the uncle and nephew at the time the note was given, but only to a single declaration, which they said the uncle made, that the note was given for services rendered, and for taking care of him the rest of his life. There was no proof of any actual services rendered by Joseph H. Darlington to Caleb Darlington at any time before July, 1889, and the auditor finds that "it does not appear what the services rendered consisted of, nor the extent of them." In fact, there is nothing on this record to prove that Joseph H. Darlington had ever rendered any services of any kind to his uncle, at any time in his life, prior to the time, in July, 1889, when the latter came to live with his nephew.

By the express terms of the letter of attorney, Joseph H. Darlington undertook the duty of protection of his uncle and his estate, and the uncle agreed to ratify and confirm whatever his attorney might do for the best interests of his uncle. The auditor found that Joseph H. Darlington accepted the trust appointing him the attorney of his uncle and his agent for protecting his estate, and that a confidential relation thereupon arose between them. It is difficult to understand how the fact of such relation can be called in question. The specific power conferred by the letter of attorney was to transact all business which the principal might or could do, and to collect all moneys due or to become due to him, and to pay all his debts and obligations, as well as the debts and obligations which the attorney might contract in performing his duties.

In addition to this, the attorney was also authorized to do whatever he pleased for the protection of his principal's estate, and to further his best interests. It was for the protection of his principal's estate, and the furtherance of his best interests, that the attorney undertook the duty which fell upon him as such. It was not the property and interests of the attorney, but of his principal, that were to be protected and cared for.

This duty of care and protection is essentially a trust and confidence. In the law of principal and agent, nothing is better settled than that the agent is disqualified from dealing with the property of the principal for his own advantage. He cannot buy his principal's property, even from the principal himself, except upon the fullest disclosure of every matter which may affect its value. He is treated by the law precisely as trustees are treated who seek to make profit for themselves out of their trust relation. Their transactions are always voidable, at the mere option of the *cestui que trust*: 1 Perry on Trusts, sec. 206; *Persch v. Quiggle*, 57 Pa. St. 247; 1 Story's Eq. Jur., sec. 315; Story on Agency, secs. 210, 211; *Condit v. Blackwell*, 22 N. J. Eq. 486; *Huguenin v. Baseley*, 2 Lead. Cas. Eq. 556, 580.

We have no hesitancy in agreeing with the auditor and court below in holding that a confidential relation arose between the uncle and nephew after the letter of attorney was executed, and the duty it imposed was undertaken by the attorney. He became then and thereby charged with the special trust and confidence of protecting the property of his principal, and of managing it, so as to promote the best interests of his principal. Whatever was done by him in hostility to that duty was a breach of the trust and confidence reposed in him. The confidential relation is not at all confined to any specific association of the parties to it. While its more frequent illustrations are between persons who are related as trustee and *cestui que trust*, guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and copartners, principal and agent, master and servant, physician and patient, and, generally, all persons who are associated by any relation of trust and confidence. When the relation exists, the consequent duties and obligations are perfectly well established by long-settled law. In the case of *Yardley v. Cuthbertson*, 108 Pa. St. 395, 56 Am. Rep. 218, the relation was that of a scrivener to his employer in the writing of a will. The entire subject was much discussed, and the duties following the relation fully considered and practically enforced. We there held that where a scrivener was employed to write a codicil to a will, he became subject to a confidential relation with his employer, the testator, and could take no considerable interest as a legatee in the will, without being subject to the duty of making full disclosure to the testator of the approximate amount of the estate, of the proportionate amount of the estate which would pass to the

scrivener under the legacy in his favor, and of proving by affirmative testimony that the testamentary provision in favor of the scrivener was the free, voluntary, and intelligent act of the testator, and unaffected by any undue influence of the scrivener. Quoting from the case of *Butlin v. Barry*, 1 Curt. Ecc. 614, we said: "Where a paper has been drawn up by a person for his own benefit, or where he takes a considerable benefit under it, the presumption lies strongly against it, and it requires to be proved by satisfactory evidence *dehors* the instrument that it was the free and voluntary act of a capable testator, and executed with a full knowledge of its contents and effect." In the principal case, after citing many authorities, we said: "It is almost unnecessary to add that this is a rule of general application to all kinds of instruments, the procurers of which are large beneficiaries by virtue of their operation. It is a rule of equity, and of very ancient origin. In its ordinary statement, the fact of mental weakness in the grantor does not appear, and is not at all necessary to the application of the rule in a given case. Many, if not most, of the judicial illustrations of its application are devoid of this element."

In *Greenfield's Estate*, 14 Pa. St. 489, this court set aside a provision in a deed of trust which gave a large compensation to the trustees, one of whom was the lawyer who wrote the deed, although the grantor was of perfectly sound mind, and the deed was read over to her, and was left with her to read by herself, before execution, because of the confidential relations of attorney and client, or scrivener, upon the ground that the compensation was excessive, and that affirmative proof was not given that full explanation was made to the grantor of the character and effect of the provision in question. All the other provisions of the deed were sustained. It was not the case of a gift, but of a provision fixing the compensation of trustees, who were thereafter to perform services as trustees of the trust estate conveyed by the deed. Were it necessary, it would be profitable and instructive to make extended quotations from the very elaborate and exhaustive opinion of the court delivered by Mr. Justice Bell. A few of them will suffice, and will dispose of the whole contention in the present case. The trust estate in the case cited was of the value of about two hundred thousand dollars. There were four trustees, and the compensation of each for managing the trust was fixed, in the deed, at ten thousand dollars, amounting, in

the whole, to forty thousand dollars, or about one fifth of the estate. Bell, J., said: "As a reward for the future management of the estate, worth, at the utmost, only five times as much, the sum named has been well designated as inordinate. Yet this fact will by no means justify a charge of actual fraud against the parties who principally managed this transaction. As already intimated, there is no proof in the cause to warrant so grave an accusation. . . . But in spite of this concession, a rule of public policy and pure morals, founded in long experience of the human heart and knowledge of man's cupidity, interposes to forbid the allowance of the claim. In this feature the case presents what is called a constructive fraud, springing from the confidential relations existing between the parties. This peculiarity, withdrawing it from the operation of ordinary rules, throws upon the beneficiaries the duty of showing expressly that the arrangement was fair and conscientious, beyond the reach of suspicion. In requiring this, courts of equity act irrespective of any admixture of deceit, imposition, overreaching, or other positive fraud. It is founded upon a motive of general policy, and is designed to protect a party, so far as may be, against his own overweening confidence and self-delusion, the infirmities of a hasty judgment, and even the impulses of a too sanguine temperament. It has been beneficially applied to those confidences which owe their birth to the relation of parent and child, guardian and ward, trustee and *cestui que trust*, and, above all, attorney and client. To guard against the strong influences which these connections are so apt to originate, the law not only watches over the transactions of the parties with great and jealous scrutiny, but it often declares transactions absolutely void, which, between other parties, would be open to no exception. This is emphatically true of the relation of client and attorney, and to persons standing in a situation as *quasi* guardians or confidential advisers. Many of the cases establish the doctrine that while these connections exist in full vigor, the adviser shall take no benefit to himself from contracts or other negotiations with the advised. . . . Other authorities, where the transaction is one of contract and sale, conceding that it may not be absolutely void *ipso facto*, throw upon the agent the burden of establishing its perfect fairness and adequacy, and that it was the deliberate act of the confiding party, after being fully informed of his rights, interests, and duties, and put upon his guard against even the sugges-

tion of his own inclinations. It must appear affirmatively that no advantage has been taken of the client; and if this be not affirmatively established, *uberrima fide*, equity will treat the case as one of constructive fraud. An attorney or other confidential adviser is not permitted to avail himself either of the necessities of his client, or of his good nature, liberality, or credulity, to obtain undue advantages, bargains, or gratuities." Much more of the same tenor is contained in the opinion, and the application of the doctrine to the facts of that case was made without the least evidence of actual fraud or undue influence, and although the grantor was entirely competent mentally. It was not a case of gift, but of contract for future service, in which the compensation was fixed in the deed. It was only twenty per cent of the whole estate, and was to be divided among four trustees, making the compensation of each only five per cent of the whole. Yet it was set aside by the application of the principles above stated.

In the case of *Wistar's Appeal*, 54 Pa. St. 60, we affirmed a decree made by the court below, upon the account of a trustee who was surcharged. Allison, J., delivered the opinion of the common pleas, in which he said: "The objection to the finding of the auditor rests upon the principle that gifts, judgments, notes, or other securities given by clients, *cestuis que trust*, principals, or wards to their attorneys at law, trustees, agents, or guardians are treated as constructive frauds; and the burden of proving their perfect fairness, and the consideration for which they were given, is upon the latter; and if no such proof be established, no recovery can be had thereon. Where a claim is sought to be established by one holding a fiduciary relation to another against the person or estate which he is required to protect, the burden of establishing the claim, both as to its fairness and consideration, rests upon him who asserts his demand."

In *Darlington's Appeal*, 86 Pa. St. 512, 27 Am. Rep. 726, this court set aside a deed for a tract of land made by a wife to her husband, through a third person, more than thirty years after it was made, although it was acquiesced in by the wife during the whole of her life, and although there was no proof of fraud, imposition, undue influence, or mistake, and the deed was regularly acknowledged by the wife, who was mentally competent, before a magistrate, who said she signed without hesitation. The bill to set the deed aside was brought by the wife's son in 1872, and the deed was executed in 1841, and

reserved a life estate for the wife. In delivering the opinion, our late brother Trunkey, after stating the general rule which disqualifies one occupying a confidential relation with another from acquiring advantages, bargains, or gratuities from the other party, said: "But the burden of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney. If no such proof is established, courts of equity treat the case as one of constructive fraud. In dealings between principal and agent, or guardian and ward, or trustee and *cestui que trust*, the same principles prevail, with a larger and more comprehensive efficiency; and the burden of proof is upon the agent, the guardian, or the trustee who claims a benefit arising from the transaction to show the utmost good faith on his part, that he took no advantage of his influence or knowledge, and that he brought everything to the knowledge of the other party which he himself knew."

In *Worrall's Appeal*, 110 Pa. St. 349, we set aside a deed for a tract of land made by a young man, soon after attaining his majority, to a woman who had been his nurse and attendant for a number of years, but who was not related to him in any manner, and between whom and himself there was no confidential relation, other than such as grew out of her attentions to him. He desired to compensate her for her services to him, because he thought his father had not done so sufficiently. He was entirely competent mentally, and he had advice; he understood thoroughly what he was doing, and there were no circumstances of fraud, imposition, or undue influence brought to bear upon him. We held, under the evidence, that the relation was one of a confidential nature, and on that account, and because of the absence of the requisite affirmative proof in support of the conveyance, we treated it as a case of constructive fraud, and set it aside upon that ground, notwithstanding the proof of long-continued and faithful service on the part of the grantee.

Applying these principles to the facts of the present case, we find that Caleb Darlington was eighty-four years old when he signed the note, that he was very feeble and infirm, and died of old age in about thirteen months thereafter; that not a particle of proof was given to show that he was informed what effect would result from his signing the note, what proportion of his estate it would require to pay it, or how it would affect his control over his property. Not one word of explanation was made to him when he signed the note; it was not

even shown that he read the note, or knew the amount of it, and he had no independent advice. Not a particle of proof was given of the making of any contract even, for his future maintenance, and nothing was given in evidence, except a single declaration that it was given for past services and for waiting on him, or taking care of him in the future. But he did not say and it was not proved that he knew the amount he was promising to pay. As to the past services, the declaration was a clear delusion, because there were none. Was the amount, then, a reasonable compensation for the future maintenance? As the nephew actually collected two thousand one hundred dollars from the personalty, and the farm sold for six thousand eight hundred dollars, the value of his estate was about nine thousand dollars. The interest of this sum would be over five hundred dollars a year. He was a bachelor, with no one depending upon him, and of simple and inexpensive habits. He was not afflicted with any loathsome disease, and his probabilities of life were very short indeed. It would seem that the income of his estate alone would probably support him, or very nearly so. It was the duty of the attorney to protect his principal's estate, and act only for his best interests, yet within four months after the relation was established, he had practically obtained from his principal, for his own private gain, almost the whole of his estate.

In *Greenfield's Estate*, 14 Pa. St. 489, the compensation to be paid for the future service was only twenty per cent of the whole estate, and it was to be divided among four; here it was very nearly the whole of the estate, and was all to be taken by the attorney. Such a contract, in such circumstances, is grossly unreasonable and unconscionable, and cannot be sustained. It comes clearly within the principles heretofore stated, and the very numerous authorities to be found in the books, which condemn all such transactions, not because there was mental incapacity, or any proof of actual fraud, but because of the relation between the parties, and the absence of that full and satisfactory proof that the contract in question was the free and intelligent act of the party, fully explained to him, done upon and after full information of the extent of his property, and its effect upon his estate, with a thorough knowledge of the contract and all its consequences. Moreover, the auditor allowed the nephew to retain the whole \$2,137 of money which he had collected for his uncle, as compensation for all his services during the seventeen months his uncle

lived with him, and that amount was much more than ample compensation for those services. No part of the seven thousand dollars is needed for that purpose. It must not be forgotten that Caleb Darlington had made his will on August 3, 1889, by which he gave certain pecuniary legacies, amounting to six hundred dollars, and the residue of his estate to his brother. Under the findings of the auditor, if the seven-thousand-dollar note is to be paid, there will be little or nothing left to pay the pecuniary legacies, and no residuary estate for the testator's brother. It cannot be believed that if the attention of the testator had been called to this fact when he signed the note, he would have consented to impose such a liability upon his estate. In any event it was the plain duty of the agent to fully explain this aspect of the subject to his principal before procuring from him his signature to so important an obligation. There was no such evidence in the case. Many further considerations, and many more authorities, could readily be shown in support of the conclusion that this instrument cannot be sustained; but it is quite unnecessary. We are clearly of opinion that the decree of the court below should be affirmed.

The decree of the orphans' court is affirmed, and all the costs of the proceedings are imposed upon the appellant.

PRINCIPAL AND AGENT, FIDUCIARY RELATIONS BETWEEN. — As to constructive fraud between persons occupying fiduciary relations, see note to *Ferguson v. Lowery*, 25 Am. Rep. 728, 729. An agent cannot buy property from his principal without making the fullest disclosure of all matters connected with it, within his knowledge, which it is important for his principal to know: *Norris v. Tayloe*, 49 Ill. 17; 95 Am. Dec. 568. Nor can an agent, employed to sell, become the purchaser: *Mosely v. Buck*, 3 Munf. 232; 5 Am. Dec. 508; *Robertson v. Western etc. Ins. Co.*, 19 La. 227; 36 Am. Dec. 673; *Harrison v. McHenry*, 9 Ga. 164; 52 Am. Dec. 435; *Dwight v. Blackmar*, 2 Mich. 330; 57 Am. Dec. 130; *Burke v. Bours*, 92 Cal. 108. The rule is the same where the agent obtains an indirect interest in the property, as by procuring a conveyance to his wife: *Tyler v. Sanborn*, 128 Ill. 136; 15 Am. St. Rep. 97; *Winter v. McMillan*, 87 Cal. 256; 22 Am. St. Rep. 243. See also note to *Potter's Appeal*, 7 Am. St. Rep. 279-283; note to *Richmond's Appeal*, 21 Am. St. Rep. 94-104. For a case in which a deed of trust was set aside on account of undue influence exercised by a spiritual adviser, see *Ross v. Comory*, 92 Cal. 632.

FIDUCIARY RELATIONS. — BURDEN OF PROOF rests on person occupying fiduciary relation to show that the transaction entered into between him and the person trusting him is just and fair, and that no unfair advantage was derived from the fiduciary relation: *Fisher v. Bishop*, 108 N. Y. 25; 2 Am. St. Rep. 357. See also note to *Brown v. Mitchell*, 11 Am. St. Rep. 758, 759. So in the case of a will, it is sometimes said that the existence of confiden-

tial or fiduciary relations imposes on the recipient of a gift the onus of establishing its absolute fairness: *Gay v. Gillilan*, 92 Mo. 250; 1 Am. St. Rep. 712. But the weight of authority is against such a stringent rule, and the generally accepted doctrine is, that, in addition to the existence of confidential relations, there must have been some active interference exercised by the proponent in the preparation or execution of the will, or the presumption of undue influence will not arise: *Bancroft v. Otis*, 91 Ala. 279; 24 Am. St. Rep. 904.

WOODRUFF v. PAINTER.

[150 PENNSYLVANIA STATE, 91.]

BAILMENTS — LIABILITY OF STORE-KEEPER — IMPLIED CONTRACT. — A store-keeper, by opening a store, thereby invites the public to come in and transact business in the usual manner; and from such invitation an implied contract arises that no harm that can reasonably be averted shall overtake customers, the consideration for such contract being the chance of profit from their patronage. This implied contract extends to the safety of such property as the customer necessarily or habitually carries with him in pursuance of a universal custom.

BAILMENTS — LIABILITY OF STORE-KEEPER — CUSTODY OF CUSTOMER'S PROPERTY — AUTHORITY OF SALESMAN. — An open store is an invitation to the public to enter, and whatever a customer necessarily, or in common with people generally, habitually carries with him, and must necessarily lay aside in the store while making or examining his purchases, he is invited to lay aside by the invitation to come and purchase, and having laid it aside upon such invitation, and with the knowledge of the dealer, he has committed it to his custody. The care of such property is within the authority of the salesman assigned to wait upon the customer, and is a part of the transaction in which he is authorized to represent his employer.

BAILMENTS — STORE-KEEPER AND CUSTOMER — CARE REQUIRED OF STORE-KEEPER. — A watch is such a personal belonging as men usually carry with them, and remove from the person and lay aside while in a store selecting and purchasing a suit of clothes; and if a customer, by direction of the store-keeper's salesman, places his watch in a designated drawer in the store, preparatory to such selection and purchase, the store-keeper thereby becomes a bailee, chargeable with ordinary diligence, and responsible for ordinary neglect.

BAILMENT FOR HIRE — CUSTOMER AND STORE-KEEPER — DEGREE OF CARE. — A bailment for hire, where no hire is paid, requires ordinary diligence on the part of the bailee, and makes him liable for ordinary neglect. Such bailment exists only in cases where the bailment is a necessary incident of the business in which the bailee makes a profit, as in the case of a customer and a store-keeper.

BAILMENT FOR HIRE — DEMAND — FAILURE TO RETURN — BURDEN OF PROOF. — Proof of failure by a bailee for hire to return the property intrusted to him upon demand is not proof of its loss; but a failure on his part to give any such explanation of his neglect to restore the bailment upon demand as will enable the bailor to test his good faith will be sufficient to hold him to proof that he has exercised ordinary diligence in the care of it.

BAILMENT FOR HIRE — DEFENSES BY BAILEE — THEFT OF BAILMENT. — A bailee for hire, where no hire is paid, is entitled to any inferences fairly deducible from his conduct in the care of the bailment, when its return is demanded. Proof that it has been stolen without ordinary neglect on the part of the bailee is a good defense for him.

De Forrest Ballou, for the appellant.

Milton C. Work and Henry J. McCarthy, for the appellees.

HEYDRICK, J. The defendants were retail dealers in clothing in the city of Philadelphia. The plaintiff, in company with his wife, visited their store for the purpose of purchasing a suit of clothes, having upon his person at the time a watch and chain. Having selected a coat and vest, and being about to remove the corresponding garments for the purpose of trying on those selected, he took off his watch and chain, and was about to lay it on a pile of clothing, when the salesman who was waiting upon him said, "You had better put your watch here," indicating a drawer from which the vest had been taken, and adding, "It will be safe, I guess." The watch and chain were accordingly put in the drawer, and the drawer was closed by the salesman. Plaintiff, his wife, and the salesman then went to another part of the store, where there was a mirror, and the coat and vest, having been tried on, were found to be satisfactory. They next turned their attention to the selection of a pair of pantaloons, in doing which the plaintiff went twice to a dressing-room connected with the store. While he was thus engaged in trying on pantaloons, the salesman conducted his wife to a seat some distance from the drawer in which the watch and chain had been placed, and to the vicinity of which she had returned after the coat and vest had been selected, and there entertained her during the time her husband was in the dressing-room. When the entire suit had been selected, and the plaintiff had replaced the garments which he wore when entering the store, he said to the salesman, "Now we will take the watch." The salesman opened the drawer into which it had been placed, but it was not there. Several persons who had been in the store during the selection of the suit, but who had left, were sent for and questioned by one of the defendants, but the watch and chain were not found and returned to the plaintiff. While search was being made for the watch, the plaintiff asked the salesman whether they were in the habit of putting things like it in the drawers, and he replied that they had done so many times and nothing of the

kind had happened before. Having paid for the suit purchased, the plaintiff asked one of the defendants whether he thought it was right that he, the plaintiff, should lose the watch. The reply was, that he would have to lose it; but the defendants would do all they could to assist him in finding it. The watch has never been returned to the plaintiff. Upon proof of these facts the court below nonsuited the plaintiff, and its refusal to take off the nonsuit is the single error assigned.

When the defendants opened a retail clothing store, they thereby invited the public to come into their place of business and purchase clothing in the usual manner. And when they extended this invitation they assumed some duty to the people who should respond to it. Even the householder who permits the use of a path leading to his house is deemed to hold out an invitation to all people who have any reasonable ground for coming thither to pass along his pathway, and is therefore held responsible for neglecting to fence off dangerous places: 1 Addison on Torts, 203. So, too, a shop-keeper is liable for neglect on leaving a trap-door open without any protection, by which his customers receive injury: *Lancaster Canal Co. v. Parnaby*, 11 Ad. & E. 223. In like manner, it cannot be doubted that if these defendants had maintained or permitted a danger of any kind in their store, and by reason of it the plaintiff had sustained bodily injury, they would have been answerable to him for the consequences. In such case they would be said to have been guilty of negligence, — guilty of a neglect of a duty which they owed to the customer; but I apprehend that the duty neglected would arise from an implied contract that if customers would come to their store, no harm that could reasonably be averted should overtake them, and the consideration for such promise would be the chance of profit from their patronage. Upon principle, the contract must be held to extend to the safety of such property as the customer necessarily or habitually, in pursuance of a universal custom, carries with him. Whatever thus necessarily, or in common with people generally, he habitually carries with him, and must necessarily lay aside in the store while making or examining his purchases, he is invited to lay aside by the invitation to come and purchase, and having laid it aside upon such invitation, and with knowledge of the dealer, he has committed it to his custody. And this being a necessary incident of the business upon which the customer was invited to come

to the store, the care of the property would be within the authority of the salesman assigned to wait upon him; it would be part of the transaction in which he is authorized to represent his employer. This much was assumed without question in *Bunnell v. Stern*, 122 N. Y. 539; 19 Am. St. Rep. 519, — a case differing from the present in this only, that the article lost was a lady's cloak, and the saleswoman took no care whatever of it.

Assuming that the jury would have found that a watch is such personal belonging as men usually carry with them, and that in the selection of a suit of clothes it is necessary or usual to remove it from the person and lay it aside, and further, that the plaintiff, by direction of the defendants' salesman, placed his watch in a designated drawer in the store, preparatory to the selection of a suit of clothes, to purchase which he visited the store, the defendants thereby became chargeable as bailees. The principles which govern that relation are briefly and clearly stated by Judge Story, in his work on bailments, thus: "When the bailment is for the benefit of the bailor, the law requires only slight diligence on the part of the bailee, and, of course, makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect. When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect. Manifestly, the bailment in a case like the present is of the latter class, for, while the customer pays nothing directly, or *eo nomine*, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade, of which the bailment is a necessary incident. It was upon this principle that Lord Holt said, in *Lane v. Cotton*, 12 Mod. 483, an action was sustainable against an innkeeper for the loss of a guest's goods, and that the court of appeals affirmed the judgment of the court of common pleas of the city of New York in *Bunnell v. Stern*, 122 N. Y. 539; 19 Am. St. Rep. 519. In Massachusetts, the proprietor of a liquor-store who permitted an order-slate for an expressman to be kept in his store, and allowed people to leave packages there to be taken away by the expressman, was held to be a bailee for hire, on the theory that what he thus permitted brought him an increase of business: *Newhall v. Paige*, 10 Gray, 366. This, however, would seem to be pushing the principle to a dangerous ex-

treme; it would render it unsafe for any business man to allow another's property to be left about his premises, and would be in seeming conflict with our own cases of *First Nat. Bank v. Graham*, 79 Pa. St. 106; 21 Am. Rep. 49; and *De Haven v. Kensington Nat. Bank*, 81 Pa. St. 95. The safer rule is to hold a bailment to be for hire, when no hire is paid, in such cases only as it is a necessary incident of a business in which the bailee makes profit; and such the jury might have found the present case to have been.

The remaining question is, whether, upon the assumption that there was a bailment for hire, proof of failure of the defendants to return the watch and chain upon demand was, under the circumstances, sufficient to carry the case to the jury. If what was said by the plaintiff should be taken as proof that the property was lost, we would be met with a conflict of authority elsewhere as to the effect of it, and find little in our own books to help us determine whether the burden was upon the plaintiff to prove negligence, or upon the defendants to repel the inference of it. But the plaintiff's evidence amounts to no more than that the salesman examined the drawer in which the watch had been placed and some others, and did not find it, and that several persons, not employees of the defendants, who had been in the store and left, were sent for, and interrogated without result. All this did not prove a loss, nor even that the defendants said the watch was lost or had been stolen. In *Logan v. Mathews*, 6 Pa. St. 417, it was held that if a bailee for hire return the property in a damaged state, and give no explanation how the injury happened, the burden of proof to show that there was no negligence is upon him. In harmony with this judgment, a bailee who fails to give any such explanation of his neglect to restore the property intrusted to him as will enable the bailor to test his good faith ought to be held to proof that he has exercised ordinary diligence in the care of it. Doubtless the defendants were entitled to the benefit of any inferences fairly deducible from their conduct when the watch was demanded, but such inferences were for the jury. If the case had been submitted to them, and they had found, as an inference from the facts proved, that the watch had been stolen, such finding would have been a complete exculpation, unless they further found that the defendants had not exercised ordinary care.

The judgment is reversed, and a *venire facias de novo* awarded.

BAILMENTS — LIABILITY OF BAILEE FOR HIRE FOR FAILURE TO RETURN GOODS. — When the right to receive compensation for his services may be inferred from the circumstances of a deposit, the duty of the bailee becomes that of a depositary for hire, and he is bound to exercise ordinary care: *Smith v. Nashua etc. R. R.*, 27 N. H. 86; 59 Am. Dec. 364.

BAILMENTS — LIABILITY OF BAILEE OF NAKED DEPOSIT. — A deposit, properly so called, is a naked bailment, and exists when one of the contracting parties gives something to the other to keep, who is to do so gratuitously, and return it upon request. In such a case the depositary is bound to exercise ordinary care: *Rozelle v. Rhodes*, 116 Pa. St. 129; 2 Am. St. Rep. 591, and note; *Smith v. Nashua etc. R. R.*, 27 N. H. 86; 59 Am. Dec. 364. A gratuitous bailee is liable only for gross neglect: *Tancil v. Seaton*, 28 Gratt. 601; 26 Am. Rep. 380; *Knowles v. Atlantic etc. R. R. Co.*, 38 Me. 55; 61 Am. Dec. 234, and note; *Beardslee v. Richardson*, 11 Wend. 25; 25 Am. Dec. 596, and note; *Glover v. Burbidge*, 27 S. C. 305; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263. A deposit made at the instance of the bailee requires the observance of ordinary care, at least: *Green v. Hollingsworth*, 5 Dana, 173; 30 Am. Dec. 680.

BAILMENTS — FAILURE TO RETURN — BURDEN OF PROOF. — A bailee, if he wishes to exonerate himself from liability for the loss of the bailment, must show the fact and manner of the loss. The burden must then be assumed by the bailor to show that the loss was due to the bailee's negligence: *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586; *Stewart v. Stone*, 127 N. Y. 500. Evidence of a demand and refusal is sufficient to throw upon the bailee the burden of showing that the bailment was lost without his fault or negligence: *Beardslee v. Richardson*, 11 Wend. 25; 25 Am. Dec. 596, and note with cases collected; *Cumins v. Wood*, 44 Ill. 416; 92 Am. Dec. 189, and note; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263. See extended note to *Schmidt v. Blood*, 24 Am. Dec. 150. A bailee who receives property as a mere depositary for safe-keeping is bound to deliver to the bailor upon demand, or assume the burden of showing why he should not: *Wetherly v. Straus*, 93 Cal. 283.

BAILMENTS — THEFT OF BAILMENT — LIABILITY OF BAILEE. — Theft is not presumptive evidence of bailee's want of ordinary care: *Mills v. Gilbreth*, 47 Me. 320; 74 Am. Dec. 487, and note. Where a bailment is stolen, the bailee is not liable for its loss, unless he was guilty of gross negligence in his care of it: *Tancil v. Seaton*, 28 Gratt. 601; 26 Am. Rep. 380. See extended note to *Schmidt v. Blood*, 24 Am. Dec. 154. But a bailee without hire is liable for a bailment of money taken out of his safe by a clerk, whom he allowed to enter the safe: *Glover v. Burbidge*, 27 S. C. 305. In *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, it was held that a bank which was the naked depositary of a cask of gold coin was not liable to the depositor for its value, where it was fraudulently taken out of the bank by the cashier.

SCHAEFFER v. JACKSON TOWNSHIP.

[10 PENNSYLVANIA STATE, 145]

NEGLIGENCE — PROXIMATE AND REMOTE CAUSE APPLIES TO MUNICIPALITIES. — The rule that a person is responsible for such consequences of his fault as are natural and probable, and might be foreseen by ordinary forecast, but not for such as are the result of an extraordinary event, not likely to be foreseen, applies in actions against municipal and quasi municipal corporations, as well as to natural persons and private corporations.

NEGLIGENCE — CONCURRENCE OF CAUSES APPLIES TO MUNICIPALITIES. — The rule that the concurrence of an ordinary cause with the negligence of a party will not relieve him from responsibility for the resultant injury applies as against municipal and quasi municipal corporations, as well as to private persons and corporations.

HIGHWAYS — LIABILITY OF TOWNSHIP FOR NEGLIGENCE. — When the negligence of a township in allowing a highway to remain out of repair concurs with an extraordinary outside cause in producing an injury, the township is not liable, but the concurrence of an ordinary outside cause with such negligence will not so relieve it.

HIGHWAY — LIABILITY OF TOWNSHIP FOR DEFECT CONCURRING WITH EXTRAORDINARY CAUSE. — When, from extraordinary causes, for the existence of which township officers are not responsible, and of which they cannot be presumed to have had notice, a driver loses control of his horses, and they afterward come in contact with a defect in the highway, the township is not liable for the resultant injury or damage.

HIGHWAYS. — To RENDER TOWNSHIP liable for injury caused by defects in a public highway, such defect must have been the sole efficient cause of the injury.

HIGHWAYS — LIABILITY OF TOWNSHIP — NEGLIGENCE. — Where the proximate cause of an injury on a highway is the fright of a horse, and that fright is not caused by any defect in the highway, or by any neglect of duty on the part of the township officers, the township is not liable, although the injury is caused by the frightened horse running into a defect in the highway.

W. M. Derr, for the appellant.

Grant Weidman and P. S. Keiser, for the appellee.

HEYDRICK, J. The plaintiff, an infant of less than four years of age, brought suit in the court below to recover damages for injuries received in the same accident out of which *Jackson Tp. v. Wagner*, 127 Pa. St. 184, 14 Am. St. Rep. 833, grew. According to the plaintiff's witnesses, he started, in company with his mother, two younger children, and Miss Wagner, the plaintiff below in *Jackson Tp. v. Wagner*, 127 Pa. St. 184, 14 Am. St. Rep. 833, to drive over one of the highways of the defendant township. At this time there was upon the side of the road in question a stone-pile about twenty-five feet in length by from one to three feet in height, and at the

side of the stone-pile a hole, in respect to the dimensions of which these witnesses differed widely, varying, as to the depth, from eight to eighteen inches; as to the width, from eight inches to three feet; and as to the length, from one to five feet. The same witnesses differed as to the width of the road between this hole and the gutter almost as much, — one of them asserting that it was but seven or eight feet, while four others testified that it was from twelve to fourteen feet wide. Upon this evidence, to which greater credit seems to have been given than to that on the part of the defendant, the jury found, under proper instructions as to the duty of the supervisors, that the road was not, on the day and at the place of the accident, suitable and sufficient for public travel conducted in the ordinary manner and by the ordinary means of conveyance. It must therefore be assumed that the township was guilty of negligence; and as there could be no question of contributory negligence on the part of an infant of such tender years as the plaintiff, the only question to be determined is, whether, upon the further facts testified to by the plaintiff's witnesses, the township is liable for the injury sustained by the plaintiff upon this road.

Whatever the condition of the road may have been, the party passed over it safely and without noticing any defect therein, but when they had reached a point about one hundred and twenty feet beyond the stone-pile, where the road was in good condition, they met a donkey, drawing a cart loaded with tin cans, and another donkey, which, in the language of the witnesses, was "loose, and came towards the horse." Thereat the horse became frightened, the driver lost control of him, and he turned suddenly around, wrenching the spokes of one of the front wheels out of the hub, and fled in the opposite direction, the hub of the broken wheel falling to and dragging upon the ground. When the buggy reached the hole already described, the end of the axle dropped into it, and the plaintiff was thrown out upon the stone-pile. The testimony upon the part of the defense showed very clearly that the occurrence was as is stated by the reporter and in the opinion in *Jackson Tp. v. Wagner*, 127 Pa. St. 184, 14 Am. St. Rep. 833, differing somewhat from the foregoing statement; but in considering the assignments of error in this case the plaintiff's testimony will be accepted as verity. So accepting it, was the defendant township answerable for the injury received by the plaintiff?

It is a general rule, as well settled as anything in the law of negligence, that a man is responsible for such consequences of his fault as are natural and probable, and might therefore be foreseen by ordinary forecast, but if his fault happen to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for the extraordinary result. This rule applies in actions against municipal and quasi municipal corporations, as well as to natural persons and private corporations. The concurrence of that which is ordinary with a party's negligence does not relieve him from responsibility for the resultant injury. Examples of such concurrence may be found in cases where, by reason of causes known to the public authorities, horses are likely to become frightened, and in their sudden fright plunge over an unguarded precipice, or rush upon some danger within the highway, for the existence of which the authorities are responsible. In such cases the consequences of the neglect of duty are natural and probable, and ought, therefore, to be foreseen. But when, from extraordinary causes, for the existence of which the supervisors are not responsible, and of which they cannot be presumed to have had notice, a driver loses control of his horses, and they come in contact with a defect in the highway, there is no more reason for holding the township answerable for a resultant injury than there is for holding any other party responsible for the result of the concurrence of something, which he could not foresee, with his negligence. In Massachusetts it was held in a well-considered case that when a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that the driver cannot stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable: *Titus v. Inhab. of Northbridge*, 97 Mass. 258; 93 Am. Dec. 91. The doctrine of this case was reiterated in *Horton v. Taunton*, 97 Mass. 266; *Fogg v. Nahant*, 98 Mass. 578; and *Stone v. Hubbardston*, 100 Mass. 49. Similarly, it has been held in Wisconsin that a town is not liable for an injury received upon a defective highway by a horse that has escaped from the control of its driver, unless it be made to appear affirmatively that the disability of the driver to control him was caused by the same or some other defect in the highway:

Jackson v. Town of Bellevue, 30 Wis. 250. In Maine also, the same subject has been much considered, and with the like result: *Moore v. Abbot*, 32 Me. 46; *Coombs v. Topsham*, 38 Me. 204; *Anderson v. Bath*, 42 Me. 346; *Moulton v. Sanford*, 51 Me. 127. In the latest of these cases it was determined that if there be two efficient, independent, proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be said to have been received through such defect, and the town is not liable therefor, though the traveler himself is in no default. It is true that in these states there are statutes defining the right of action for such injuries, but they are merely declaratory of the common law.

This precise question has not been as frequently considered in this state as in the states referred to, but in *Chartiers Tp. v. Phillips*, 122 Pa. St. 601, it was distinctly raised by a point in which the court was asked to charge that, "to render a township liable for an injury by a defect in a highway, it must have been the sole, efficient cause of the injury; and if the jury find from the evidence that this accident to the plaintiff was caused by the uncontrollable struggle of a choking horse, or from this cause concurring with a defect in the highway, then their verdict must be for the defendant." For refusal to affirm this point without qualification, the judgment of the common pleas was reversed. To the same effect is *Herr v. City of Lebanon*, 30 Week. Not. Cas. 248, decided at this term. These judgments require no vindication. They are logical deductions from the rule of law which must be invoked by every plaintiff who seeks redress for an injury received through the negligence of another. The injury must have been the natural and probable result of the defendant's negligence. But the cases must be rare in which an injury can be said to be the result of the negligence of a party, when there is another and primary, efficient, proximate cause, wholly independent of such negligence, and for which the party charged with negligence is in no way responsible. In such cases it would be incumbent on the plaintiff to show that the accident would have happened without the concurrence of the primary, efficient, proximate cause.

In this case the driver lost control of the horse the moment he took fright at the donkeys and tin cans, and she had not regained efficient control at the moment of the accident. Her

own testimony is, that she was trying to stop him, but had not succeeded. He was still pursuing his flight, dragging the wrecked buggy after him, when the occupants were thrown out. It may be conceded that the township would have been answerable for the injuries if it had appeared that the plaintiff would have been thrown out in the same manner if the horse had not received this extraordinary fright and wrecked the buggy, but this did not appear. On the contrary, it appeared in the plaintiff's evidence that the party had passed the place of the accident in safety a few minutes before without noticing any defect. But for the fright of the horse and the driver's loss of control, they would have continued their journey, and, of course, the accident would not have happened. How much the wreck of the buggy may have had to do with the final catastrophe may be inferred from the account given by plaintiff's witnesses, and the belief expressed by the driver that if the wheel, instead of the hub, had gone into the hole, the buggy would not have been upset. But the loss of the wheel was not in any manner attributable to any defect in the highway. It was admitted that the road was in good condition at the point where this beginning of the accident occurred. It is therefore clear that the proximate cause of the plaintiff's injury was the fright of the horse, and that that fright was not caused by any defect in the highway, or by any neglect of duty on the part of the supervisors.

For this reason the judgment must be reversed.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE HIGHWAYS — PROXIMATE AND REMOTE CAUSE OF INJURY. — To render a city liable for neglect to keep its streets in proper condition, such negligence must be the proximate cause of the injury: *Oline v. Crescent City R. R. Co.*, 43 La. Ann. 327; 26 Am. St. Rep. 187, and note; *West Mahanoy Township v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604, and note; *Childrey v. Huntington*, 34 W. Va. 457. A declaration against a city, alleging neglect to repair streets, fails to state a cause of action if it does not show that the alleged damages resulted from that breach of duty: *City Council v. Gilmer*, 33 Ala. 116; 70 Am. Dec. 562, and note. The negligence of a responsible agent intervening between defendant's negligence and the damage suffered breaks the causal connection. When, therefore, a person driving on a highway meets another, also driving, who fails to turn out as required by statute, and the former is compelled to drive upon the side of the road, and is injured by colliding with a post in the highway, just outside of the traveled part, the town will not be liable, but the person whose act was the proximate cause of the injury will be liable therefor: *Mahogany v. Ward*, 16 R. L. 479; 27 Am. St. Rep. 753, and note.

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTIVE HIGHWAY — CONCURRING CAUSES. — The fact that a highway is so constructed that it is not

likely to keep in good condition for a great length of time will not impose liability on a town, bound to keep it in repair, for injury caused by the sudden softening of the earth therein, unless the town had notice that the danger was so imminent as to show a want of reasonable care in guarding against accident: *Stoddard v. Winchester*, 154 Mass. 149; 26 Am. St. Rep. 223, and note. A defect in a highway for which a town is answerable must be such that it is the sole cause of the injury complained of. If such injury is the combined result of the defect, united with some distinct concurring cause, the town is not liable for the injury, unless the concurring cause be a pure accident, unaided by human agency: *Pratt v. Weymouth*, 147 Mass. 245; 9 Am. St. Rep. 691, and note; *Joliet v. Verley*, 35 Ill. 58; 85 Am. Dec. 342, and note.

MUNICIPAL CORPORATIONS — DEFECTIVE HIGHWAY — FRIGHTENED HORSE AS CONCURRING CAUSE OF INJURY. — Township officers, in keeping a public highway safe for travel, are bound to anticipate only the ordinary needs of travel; and they are not bound to anticipate the danger to which the frightened horse of a traveler may expose him: *Horstick v. Dunkle*, 145 Pa. St. 220; 27 Am. St. Rep. 685; *Hubbell v. Yonkers*, 104 N. Y. 434; 58 Am. Rep. 522, and extended note; note to *Atlanta v. Wilson*, 27 Am. Rep. 398. In the following cases the municipal corporation was held liable in damages for defects in highways, where the concurring cause of injury was the running away of a frightened horse: *Rushville v. Adams*, 107 Ind. 476; 57 Am. Rep. 124; *Atlanta v. Wilson*, 59 Ga. 544; 27 Am. Rep. 396; *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733; *Hull v. Kansas City*, 54 Mo. 598; 14 Am. Rep. 487; *Byerly v. Anamosa*, 79 Iowa, 204.

BAUM v. BIRCHALL.

[150 PENNSYLVANIA STATE, 164.]

CONFLICT OF LAWS — MORTGAGE — PLACE OF PERFORMANCE. — When a bond and mortgage for the purchase of real estate in one state are executed in another state, but show upon their face that they are to be performed in the state where the land is situated, their validity, nature, obligation, and interpretation must be governed by the laws of the latter state, although brought in question in some other state.

CONFLICT OF LAWS — MARRIED WOMAN'S BOND AND MORTGAGE GOVERNED BY THE LEX REI SITÆ. — A married woman's bond and mortgage for the purchase price of land situated in one state, executed, delivered, and to be performed in that state, and upon which, according to its laws, she is liable notwithstanding her coverture, will be construed in the courts of another state, so as to secure to her the advantages and enforce against her the obligation of her contract, in accordance with the laws of the state where it was executed and delivered.

Avery D. Harrington, for the appellant.

J. Martin Rommel and James W. West, for the appellees.

WILLIAMS, J. The defendants are, and were at the date of the bond on which this judgment was entered, husband and wife. In the winter of 1884-85 they lived in this state, near

Philadelphia. Desiring to remove to Delaware, they visited Dover and its vicinity in February in 1885, in search of a suitable farm on which to make their home. Among the farms examined by them was that of Baum, the plaintiff, from whom they got the price and terms of payment at which he would sell. They then returned to their home, near Philadelphia; but H. C. Birchall, the husband, soon after returned to Dover, and in the name and by the direction of his wife made a contract with Baum for his farm, and paid one hundred dollars hand-money upon it. It was to be closed as soon as the title papers could be conveniently prepared, pending which Birchall came back to his home in this state. . Soon after, a bond and mortgage to secure so much of the purchase-money due Baum as was not to be paid on delivery of the deed, were sent by mail to the Birchalls for execution. Both instruments were duly signed and sealed in this state, after which Birchall took them, together with his wife's check for five thousand dollars, the amount to be paid in hand, and went to Dover to meet Baum and complete the transaction. He received the deed made to his wife, delivered for her the check for five thousand dollars and the bond and mortgage to secure the balance of the purchase-money. Soon after, the Birchalls removed to their new home, and continued to reside on the farm for one and a half years, when they sold it, subject to the mortgage, and returned to this state. Their vendee did not pay principal or interest upon the mortgage, and, as the result of legal proceedings upon it, the farm was brought to sale by the sheriff. The proceeds of the sale were not enough to pay the mortgage debt, and this judgment was entered upon the bond for the purpose of collecting from Mrs. Birchall, in this state, the balance still due on the purchase-money of the farm. She then made application to open it, on the ground that the fact of her having signed the bond in this state made it a Pennsylvania contract, and that, because of her disability, it could not be enforced against her, except as to the land of which it was part of the purchase-money. The court below so held, and the correctness of this ruling is the only question presented by this appeal.

If it be conceded that the bond and mortgage were executed in this state, yet it appears upon their face that they were to be performed in the state of Delaware, and the general rule is, that in such cases the instrument is governed as to its validity, nature, obligation, and interpretation by the laws of the

place where it is to be performed: Story on Conflict of Laws, sec. 280; 2 Kent's Com. 459. Interest, which is the ordinary measure of compensation for delay in performance, is to be computed according to the law of the place of payment: *Brown v. Camden etc. R. R. Co.*, 83 Pa. St. 316. The remedy and the effect to be given to any existing disability in the maker of the instrument are also to be determined by the law of the place of payment: *Hill v. Chase*, 143 Mass. 129. The same rule applies where the contract is made by correspondence through the mails, or by telegraph. Thus it was held that if one orders goods from another state by mail, which are sent by a carrier, the contract is made where the order is received and the goods delivered to the carrier for the buyer, and the law of that state will govern the contract: *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241. The courts of this state will administer, in such cases, the *lex loci contractus* as against one under disability: *Evans v. Cleary*, 125 Pa. St. 204; 11 Am. St. Rep. 886. But this case stands on still stronger ground. Delivery is an essential part of the execution of any instrument. It is not enough to sign and seal a bond. It is effectual only when it is delivered to the party interested in it, or to some one for him. The bond might have been signed wherever it was most convenient for the obligor to give attention to it, but it was an ineffectual and useless paper until delivery to the obligor. The delivery was made in Delaware, where it was to be performed. It was made a binding obligation, its execution was completed in that state, and for this further reason it must be governed by the laws of that state.

So far we have considered the instrument as a contract without regard to the character of the subject-matter; but upon looking into the transaction of which it is a part, we learn that it is a contract relating to real property. Now, the rule relating to such contracts has been well settled from the earliest days of the English common law. Real property cannot attend the person of the owner as he goes from one jurisdiction to another. It is fixed, immovable, and necessarily under the law of the place where it lies. Contracts relating to it must therefore necessarily be governed by the *lex rei sitæ*: Story on Conflict of Laws, 424. It seems that the law of the state where Baum's farm was located makes a married woman personally liable on her bond given for property bought by her. Mrs. Birchall went there to look at and treat for this farm. She contracted for it, through her husband, in that

state. She received her deed and delivered her money, her bond and mortgage, in complete execution of her contract, there, where the land was. The law of that state determines the effect of the conveyance received by her, and of the bond and mortgage given by her to secure the purchase price of the land she bought. We have therefore a contract made and, in legal effect, delivered in Delaware, for the purchase of real property in that state, upon which, according to the laws of that state, the defendant is personally liable, notwithstanding her coverture. In passing upon it here, our courts will secure to her the advantages, and enforce against her the obligations, of her contract in accordance with the laws of that state. This conclusion requires us to reverse the order of the court below opening the judgment, and to restore it to the records.

The order is reversed and set aside accordingly.

CONFLICT OF LAWS — CONTRACTS RELATING TO REALTY, BY WHAT LAW GOVERNED. — The law of the *situs* conclusively governs as to all questions relating to rights, titles, and interests in and to real estate: *Richardson v. De Giverville*, 107 Mo. 422; 28 Am. St. Rep. 426, and note with cases collected discussing this question; *Lindley v. O'Reilly*, 50 N. J. Eq. 636; 7 Am. St. Rep. 802, and note. The *lex loci rei sitæ* determines the validity of mortgages of real property: *Fessenden v. Taft*, 65 N. H. 39. A foreclosure, in the courts of New York, of a mortgage upon lands in Connecticut has no validity: *Farmers' Loan etc. Co. v. Postal Tel. Co.*, 55 Conn. 334; 3 Am. St. Rep. 53, and note. The effect of a conveyance, made in New York, of lands in West Virginia is to be determined by the law of the latter state; but a contract made in New York, between citizens of that state, for the loan of money, to secure the payment of which such conveyance was executed, is to be governed by the laws of New York: *Klinck v. Price*, 4 W. Va. 4; 6 Am. Rep. 268.

CONFLICT OF LAWS — CONTRACTS, WHEN GOVERNED BY PLACE OF PERFORMANCE. — For a discussion of this subject, see *Waverly Nat. Bank v. Hall*, 150 Pa. St. 466; *post*, p. 823, and note with cases collected.

BUCK v. PENNSYLVANIA RAILROAD COMPANY.

[150 PENNSYLVANIA STATE, 170.]

COMMON CARRIERS — LIMITATION OF LIABILITY — BURDEN OF PROOF. — A common carrier of goods may limit his liability, except as against his own negligence; and his liability then depends upon proof of negligence in fact. If no explanation is given as to how an injury occurred, a presumption of negligence arises, justifying a recovery in cases where there is no other proof than of the delivery of the goods to the carrier in good condition, and their arrival at the point of destination in a damaged condition.

COMMON CARRIERS — CONTRACT LIMITING LIABILITY — BURDEN OF PROOF.

— When there is proof of the fact of injury to goods during transportation, but the manner of its occurrence does not import negligence on the part of the carrier, he is not liable, if his contract is for a limited liability only, unless there is proof of negligence as an inducing cause of the injury, and the burden of making such proof is upon the shipper.

COMMON CARRIERS — PRESUMPTION OF NEGLIGENCE. — AN INJURIOUS ACCIDENT alone raises a *prima facie* presumption of negligence on the part of the carrier, and devolves upon him to disprove such negligence.

COMMON CARRIER — CONTRACT LIMITING LIABILITY — NEGLIGENCE, WHEN QUESTION FOR JURY. — When goods of a delicate and fragile character are shown to have been shipped in good order, and delivered in bad order, under a contract limiting the carrier's liability, and it is also shown that the goods were carefully packed, and liable to break, with the most careful handling, and that there was no collision or wreck during their transportation, the carrier is entitled to have the question of negligence considered by the jury, with proof on his part as to just how the accident happened, to relieve him of the presumption of negligence arising from its occurrence.

ASSUMPSIT to recover the value of six stoves, shipped by the defendant company under a contract stipulating that because of their fragile character, and in consideration of reduced rates, the carrier was released from liability for loss or damage during transportation. The stoves were loaded and the car holding them sealed at Reading, and opened at Columbia, for the purpose of transferring them to another car. Here they were found to be broken. The evidence showed that they were carefully packed in the car when the transportation began, that there had been no wreck or collision during the transit, and that the stoves could have been broken by the jar of the cars, even with the most careful handling. The instructions given and objected to sufficiently appear from the opinion.

Thomas H. Murray and Cyrus Gordon, for the appellant.

Alonzo P. MacLeod and Walter Barrett, for the appellee.

GREEN, J. In the main, the learned court below correctly instructed the jury as to the law of the case, and in certain portions of the charge the question of the defendant's negligence was apparently left to the jury on the whole testimony affecting that subject. The complaint, however, of the defendant is, that in certain other portions of the charge the jury were wrongly instructed as to the burden of proof, and were told that unless the defendant proved just how the injury to the stoves was inflicted, a conclusive presumption of negligence

arose, "and the defendant must be regarded as an insurer, and not as a bailee for hire, with a limited liability under the contract." It is, of course, not disputed under our decisions that the carrier of goods may limit his liability, except as against his own negligence, and in that event the liability depends upon the proof of negligence in fact. If no explanation whatever is given as to how the injury occurred, a presumption of negligence arises, which is sufficient to justify a recovery in cases where there is no other proof than of the delivery of the goods to the carrier in good condition, and their arrival at the point of destination in a damaged condition. Such were the cases of *American Exp. Co. v. Sands*, 55 Pa. St. 140, and *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360. On the other hand, where there is proof of the fact of the injury and the manner of its occurrence in circumstances which did not import negligence of the defendant, there is no liability of the carrier, whose contract was for a limited liability only, except upon proof of negligence as an inducing cause of the injury, and the burden of making such proof is upon the plaintiff. Such are the cases of *Farnham v. Camden etc. R. R. Co.*, 55 Pa. St. 53, and *Patterson v. Clyde*, 67 Pa. St. 500.

In the latter of these cases, Mr. Justice Agnew said, speaking of the carrier: "When he has shown a loss within the exception of his contract, without apparent negligence, he has brought himself within the terms of his bargain. On what principle is that bargain to be nullified by requiring of him the production of that evidence, the loss or difficulty of obtaining which was the very reason for limiting his responsibility?"

In that case the ship was destroyed by a fire at sea, with all her cargo, but without proof as to the manner of the accident, and it was held there was no liability without affirmative proof of negligence, the burden of which rested upon the plaintiff.

In the case of *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. St. 577, 4 Am. St. Rep. 670, a right of recovery also was denied because there was no affirmative proof of negligence given by the plaintiff. The freight carried was a horse, under a limited liability contract, and it was shown that the animal was in good condition when shipped, but was found dead when the car was opened. There was no proof as to how the animal died, but there was proof that no accident happened to the train, or the car in which the horse was placed. We held that, in the absence of proof as to how the horse died, and of any

proof of negligence by the defendant, there could be no recovery. Our brother Williams said: "If, for any reason, an 'injurious accident' happens to or by reason of that which the carrier provides for the transportation, the law, which imposes the exercise of the utmost care upon him, presumes the accident to be due to the want of that care, and puts upon him the duty of successfully relieving himself from that presumption. But when the fact of an 'injurious accident' is not shown to exist, the presumption which arises from it cannot be invoked by a plaintiff." We held that, in the absence of any proof of the happening of an accident or the negligence of the carrier, the court below should have given a binding instruction to find for the defendant.

In the case of *Phœnix Pot Works v. Pittsburgh etc. R. R. Co.*, 139 Pa. St. 284, which was very like the present case, we held it was for the jury to say whether, upon the whole testimony, the injury to the freight was occasioned by the negligence of the defendant. There was proof that the pots were carefully packed, and that there was no collision or derailment on the way. There was no direct testimony as to how the injury occurred, or of any specific negligence on the part of the defendant. The court below left the case to the jury, saying to them: "It is for you to say whether there was any negligence on the part of the railroad company"; and we affirmed the correctness of this direction.

Recurring now to the present case, it is plain that it was for the jury to say, upon all the evidence, whether the defendant was guilty of negligence, in the transportation of the stoves, which resulted in their injury. We think the charge went rather too far in the direction of instruction that the defendant must show how the injury was occasioned, implying that the very circumstances of the damage must be proved by the defendant, in order to relieve themselves of the charge of negligence. There can be no doubt that the fact of a shipment in good order, and a delivery in bad order, is evidence of negligence of itself, but it is evidence only, and must be considered along with all the other evidence by the jury. There was evidence that the stoves were carefully packed, and that there was no kind of collision, or accident of any description, in the course of the transportation. The defendant was entitled to the benefit of this proof upon their general allegation of due care, and to have it considered by the jury, although they could not, or did not, prove affirmatively just how the injury

was occasioned. The court did, in substance, leave the whole case to the jury on the general allegation of negligence, but also instructed them particularly, as complained of in the fourth assignment, that unless the defendant showed how the accident occurred, the legal presumption arose that they were liable for the damage. The effect of such instruction would naturally be to lead the jury to believe that they must find for the plaintiff, unless the defendant had shown distinctly the actual facts and circumstances of the accident to the stoves. This, of course, might be entirely impossible, and yet from the other facts in the case the jury might be satisfied that the stoves were not injured in consequence of any neglect of the defendant. There was proof that the stoves were exceedingly brittle, and that they were likely to break upon the mere handling of them, and without any jarring or jolting of the cars. If, notwithstanding the regular and entirely careful handling of the stoves by the defendant, they were liable to break without any negligence of the defendant, that circumstance might fairly be considered by the jury as relieving or tending to relieve the defendant from the charge of negligence. But, under the charge, it was apparently an essential prerequisite to freedom from an imputation of negligence that the defendant must show the actual facts and circumstances of the accident. While such proof manifestly does impose the burden of proof of negligence upon the plaintiff, if it shows the accident occurred without negligence of the defendant, it seems to us that its absence does not deprive the defendant of the right to have the question of negligence considered upon all the testimony. These views impel us to sustain the first five assignments of error. The remaining assignments are not sustained.

Judgment reversed, and new *venire* awarded.

CARRIERS — CONTRACTS LIMITING LIABILITY. — A common carrier cannot, by contract with a shipper, relieve itself in any manner from liability for damages arising from loss or injury resulting from its own negligence: *Johnson v. Alabama etc. R'y Co.*, 69 Miss. 191; *Chicago etc. R. R. Co. v. Witty*, 32 Neb. 275; 29 Am. St. Rep. 436, and note; *Chicago etc. R'y Co. v. Chapman*, 133 Ill. 96; 23 Am. St. Rep. 587, and extended note, in which this subject is fully treated. But see, however, *Pacific Express Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107, and note.

NEGLECT — PRESUMPTION OF, FROM HAPPENING OF INJURIOUS ACCIDENT: See *Volkmar v. Manhattan R'y Co.*, 134 N. Y. 418; *ante*, p. 678, and note.

DIFFENBAUGH v. UNION FIRE INSURANCE CO.

[150 PENNSYLVANIA STATE, 270.]

INSURANCE — DISCLOSURE OF TITLE — HUSBAND AND WIFE — EVIDENCE TO SHOW AGENCY. — When a policy of fire insurance provides that it shall be void if the interest of the insured is not truly stated therein, and it is taken out upon property of a wife in the name of her husband, without notice to the insurer of her ownership, she cannot recover for the loss in her own name; nor is evidence admissible, in such case, to show that the husband was acting as her agent when he procured the insurance, in the absence of an offer to reform the policy or to show that the insurer knew of the agency.

H. C. Brubaker and G. C. Kennedy, for the appellant.

Mariott Brosius, for the appellee.

PAXSON, J. This was an action in the court below to recover the amount of loss sustained under a fire insurance policy. Upon the trial below, the plaintiff offered the policy in evidence, which, upon objection, was excluded by the court. The ground for this ruling was that the policy was in the name of Henry Diffenbaugh, while the suit was brought in the name of Emma M. Diffenbaugh, his wife. In other words, the husband insured the property in his own name, while the insurable interest and title thereto was in his wife. The learned judge also declined to permit the plaintiff to prove by her husband that he was acting as her agent when he made the application for the insurance with the agents of defendant company. There was no offer to show that when the company wrote the policy they were informed of the fact that the property belonged to the wife.

The plaintiff relies upon *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 349, Story on Agency, and some other authorities, to sustain her position that where an insurance is effected by an agent, he may insure in his own name, or in the name and for the benefit of his principal. Story does certainly lay down this doctrine, and we are not now disputing it. All that *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 349, decided was, that a tenant by the curtesy has an insurable interest in the real estate of his wife. It is true, the language of Woodward, C. J., is broader than the point decided. In the case in hand, however, the policy contains a clause which takes it out of the line of cases cited by the appellant. The clause is as follows: "This entire policy shall be void . . . if the interest of the insured be not truly stated herein." This clause is not without force. Its meaning is apparent. Its object is to enable

the insurance company to know who it is insuring. It might be entirely willing to insure the property of A, and yet refuse to insure the property of B upon any terms. As there was no pretense that when Henry Diffenbaugh insured this property in his own name he informed the company that the property belonged to his wife, we are of opinion the latter cannot recover, and that she was properly nonsuited.

It is true that equity will reform a written contract in a case of fraud, accident, or mistake. There was no evidence, however, before the court by which this contract could have been reformed, nor was there any offer made to reform it.

Judgment affirmed.

INSURANCE — WHETHER HUSBAND HAS INSURABLE INTEREST IN WIFE'S PROPERTY. — A policy of insurance taken by a husband in good faith on his wife's goods is void, even though the insurer knew the true ownership: *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; 31 Am. Rep. 326; *Traders' Ins. Co. v. Newman*, 120 Ind. 554; *Pelican Ins. Co. v. Smith*, 92 Ala. 428. Where a husband took out a policy of insurance in his name, on what he claimed to be his property, but which, after loss, proved to be the property of his wife, she cannot recover on the policy, because the contract was with the husband, and contained no hint of agency or trusteeship: *Zimmerman v. Farmers' Ins. Co.*, 76 Iowa, 352. A husband in possession and enjoyment, with his wife, of her real and personal property, with an inchoate right of curtesy, has an insurable interest in both: *Trade Ins. Co. v. Barraciff*, 45 N. J. L. 543; 46 Am. Rep. 792. A husband has an insurable interest in his wife's property, in Maryland: *Mutual etc. Ins. Co. v. Deale*, 18 Md. 26; 79 Am. Dec. 673, and note.

INSURANCE — FAILURE TO STATE TRUE INTEREST IN PROPERTY INSURED. — Policies need not disclose the nature of the interest of the insured, unless some condition in them requires such disclosure: *Riggs v. Commercial etc. Ins. Co.*, 125 N. Y. 7; 21 Am. St. Rep. 716. The omission of the owner of an equitable title to state the nature thereof will not avoid a policy of insurance, under a condition forfeiting the insurance if the interest of the insured is other than entire and sole ownership, if the fact is not so represented to the company: *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615. If a policy provides that any interest not absolute must be represented as such, and the interest of the insured is not absolute, but was so represented, no recovery can be had on the policy: *McCormick v. Orient Ins. Co.*, 86 Cal. 260; *Hennings v. Western Assur. Co.*, 77 Iowa, 319; *Weed v. London etc. Ins. Co.*, 116 N. Y. 106. Where the policy provides that the insurer shall not be liable if the interest of the assured is not one and absolute and sole ownership, no recovery can be had if his interest is less: *Collins v. St. Paul etc. Ins. Co.*, 44 Minn. 440; *East Texas etc. Ins. Co. v. Brown*, 82 Tex. 631; *Brown v. Commercial etc. Ins. Co.*, 86 Ala. 189. Fraudulent concealment or misrepresentation in regard to an owner's interest in insured property, to the prejudice of the insurer, will avoid the policy: *Morrison v. Tennessee etc. Ins. Co.*, 18 Mo. 282; 59 Am. Dec. 299, and extended note; *Mutual etc. Ins. Co. v. Deale*, 18 Md. 26; 79 Am. Dec. 673, and note. See *Western Assur. Co. v. Stoddard*, 88 Ala. 606.

SHACKAMAXON BANK v. YARD.

[150 PENNSYLVANIA STATE, 351.]

SURETYSHIP — CHANGE OF DUTIES OF PRINCIPAL. — To DISCHARGE A SURETY by a change in the duties of the principal, the change must be such as to interfere with or modify the duties for the faithful performance of which the surety is bound, so as to make it inequitable to enforce his undertaking upon a state of facts not within the contemplation of the parties, and not consented to by the surety.

SURETYSHIP — INCREASE OF DUTIES OF PRINCIPAL. — The fact that a bank cashier, after giving a bond as such, assumes to keep the individual ledger of the bank without notice to his sureties of such additional duty, is not such a change or modification of his duties as cashier as will of itself discharge such sureties from their undertaking for his faithful performance of his official duties as cashier.

SURETYSHIP — DEATH OF SURETY AS REVOCATION OF. — When a contract of suretyship is binding upon heirs, executors, and administrators during the employment of the principal in a particular office, it is not revoked by the death of the surety, and his estate is still bound, although the principal is not regularly re-elected to that office, but continues to perform the duties thereof without re-election.

A. Simpson, Jr., and A. W. Horton, for the appellant.

R. C. McMurtrie, for the appellee.

WILLIAMS, J. This case was here in 1891, and is reported in 143 Pa. St. 129; 24 Am. St. Rep. 521. The question then presented was, whether a formal re-election of the cashier each year was necessary, in order to the liability of the surety on his official bond. The learned judge of the court below was of that opinion, and accordingly entered judgment in favor of the defendant. The plaintiff appealed, assigning the ruling upon this question as error. We sustained the assignment, and directed judgment in favor of the plaintiff on the reserved point. The defendant is now the appellant. He contends that he is discharged from all liability on his bond because the bank had increased the duties of the cashier without his consent, and before the embezzlement complained of was committed. The general proposition on which he relies is found stated in the defendant's eighth point, as follows: "8. Any permanent material alteration in the cashier's duty without the consent of the surety discharges him from liability." The court declined to instruct the jury as requested, and this action is the subject of the third assignment of error.

A case might be presented in which the duties of an officer or employee might be so changed as to make it inequitable to hold his sureties for an act occurring after the change had

taken place; but that would depend on the character of the change, and not on the mere fact that a change had been made.

In this case it appears that Huggard was elected cashier, and gave the bond now sued on as security for the faithful performance of the duties of his office. Subsequently he proposed to keep the individual ledger, in addition to doing his work as cashier, for an additional sum of five hundred dollars per annum. To this the directors agreed; and the extra work done by him as a book-keeper under this agreement is the basis of the allegation that a material alteration has been made in his duties as cashier that should relieve his sureties from liability.

The proofs show that, as cashier, Huggard embezzled, and aided others to embezzle, a large amount of the bank's money. It is not denied that he is liable to the bank for his breach of duty. The sureties admit that their principal has broken the condition of the bond, and that their liability would be fixed if the circumstances on which they rely to show their discharge from such liability did not exist.

The contention is, that the fact that Huggard performed other services for the bank than those involved in or belonging to the office of cashier is, *per se*, a discharge of the sureties from their undertaking for his faithful performance of his official duties. This position is thought to find support in the recent case of *American Dist. Tel. Co. v. Lennig*, 139 Pa. St. 594. In that case one had been employed as a book-keeper, and had given a bond, with sureties, to secure his employers against loss by his want of fidelity in the performance of his work. Afterwards he was made cashier *pro tempore*, and a few days later he was appointed to that office. While acting under the *pro tempore* appointment he embezzled money belonging to his employers. To conceal the crime so committed, he made false entries in the books. An action was brought upon the bond given on his appointment as book-keeper, to recover for his embezzlement as cashier *pro tem*. The sureties defended on the ground that the money sought to be recovered from them was lost by reason of the embezzlement of the cashier, and not by reason of any act of the book-keeper as such. This court held that if the fact was as the sureties alleged, they were right in their legal position; but as the embezzlement occurred before their principal was duly appointed cashier, the capacity in which he was acting at the time was

a question for the jury, on which the sureties had a right to be heard. In the opinion delivered by our late brother Clark it is said: "Neither the imposition of additional, distinct, and consistent duties, nor the appointment of the principal to an additional office, would necessarily relieve the surety on his bond, if the new duties or the new office have no such connection with the old as to interfere with or affect the original employment." The book-keeper, as such, had no access to the funds of his employer. When he was put in charge of them as cashier he had new duties and responsibilities put upon him, which were not in contemplation of his sureties when they entered into their undertaking on his behalf. If his default was in discharge of his new duties, and these were not such as, in the temporary absence or removal of a cashier, were incidental to his employment until a new cashier could be secured, then his sureties were not liable. If, on the other hand, his duties under his *pro tempore* appointment were such as are incidental to an employment as book-keeper, then their liability on their bond was not relieved against, and the plaintiff was entitled to recover.

This does not support the position contended for in this case. Huggard's appointment was to the office of cashier. The defendants gave their bond to secure his fidelity in the performance of the duties of that office. It was as cashier that he embezzled and misappropriated funds that it was his duty to deal honestly with, so that the breach of the condition of the bond was conceded. The extra work done by him on the books, by virtue of his employment to keep the individual ledger, was the sole reliance of the defendant. But what change did this extra work make in his duties as cashier? It did not affect his custody of the money of the bank. It did not increase his responsibilities as an officer, or his opportunities for embezzlement. The most that is suggested is, that it might afford some help in the temporary concealment of his crime. Under the rule laid down in *American Dist. Tel. Co. v. Lennig*, 139 Pa. St. 594, this is not enough. The duties of the new office must be such as to interfere with or modify the old. If they are not, the sureties cannot complain. It is not enough that some change in the work of the appointee, the principal, has been made. It must also appear that the change was such as to interfere with or modify the duties for the faithful performance of which the sureties are bound, so as to make it inequitable to enforce their undertaking upon a state of facts

not within the contemplation of the parties when it was made. The first, second, and third assignments of error are not sustained.

The remaining assignments relate to the effect of the death of the surety upon his liability under the facts of this case. The subject was discussed on the trial in the court below, and the point was ruled against the defendant. As the defendant did not then appeal, the question came only incidentally before us at that time; but the holding that, notwithstanding the want of a formal re-election of the cashier, the liability of the sureties continued to the end of his term of service might be properly regarded as covering the question now raised.

The surety had undertaken for himself, "his heirs, executors, and administrators," to be responsible for Huggard's honesty in the office of cashier during the entire time of his employment as such, whatever that time might be. Under *Pleasanton's Appeal*, 75 Pa. St. 344, the obligation contained no stipulation authorizing the termination of the relation between the principal and the bank by notice. If the bank had refused to retain Huggard, and put some one else in his place, the surety would thereafter have ceased to be liable, because his principal had ceased to be cashier; but so long as he remained in the employment of the bank in that office, under whatever election or form of organization, the liability of the surety was, by express words, to remain. The parties contemplated a permanent relation. The bond provided for it in apt words, and we see no reason why the liability should not be enforced.

The assignments relating to this question are not sustained, and the judgment is affirmed.

SURETYSHIP — CONSTRUCTION OF CONTRACT OF. — The contract of suretyship is to be strictly construed, and the surety will not be held liable beyond the letter of his contract: *People v. Foster*, 133 Ill. 496; *Vinyard v. Barnes*, 124 Ill. 346; *Crescent Brewing Co. v. Handley*, 90 Ala. 486; *Vann v. Lunsford*, 91 Ala. 576; *Shreffler v. Nadelhoffer*, 133 Ill. 536; 23 Am. St. Rep. 626, and note.

SURETYSHIP. — RELEASE OF SURETY BY CHANGE IN DUTIES OF PRINCIPAL: See extended note to *First Nat. Bank v. Gerke*, 6 Am. St. Rep. 458. See also *Lafayette v. James*, 92 Ind. 240; 47 Am. Rep. 140.

SURETYSHIP — EFFECT OF DEATH OF SURETY. — This question is discussed in an extended note to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 814.

KITCHEN v. McCLOSKEY.

[150 PENNSYLVANIA STATE, 376.]

TRESPASS AGAINST SHERIFF FOR WRONGFUL SALE. — One who acquires title to property after levy and before sale may maintain trespass against a sheriff for wrongfully selling it as the property of another, with notice of its true ownership.

FRAUDULENT CONVEYANCES. — **CONFESSION OF JUDGMENT BY ONE BROTHER** in favor of another, for a debt justly due, does not raise a presumption of fraud as to other creditors. If fraud is alleged in such case, it must be clearly and distinctly proved. Trivial circumstances will not be considered as evidence of it.

FRAUDULENT CONVEYANCES — PREFERRING CREDITORS — CONFESSION OF JUDGMENT. — One who is in debt to different persons may give a preference to any one of them, by confessing a judgment in his favor. The fact of the other indebtedness weighs nothing against the validity of such preference.

TRESPASS against a sheriff for a wrongful sale of two horses, owned by plaintiff, as the property of another. Joseph R. Kitchen confessed judgment for \$286.40 in favor of his brother, Andrew L. Kitchen, the plaintiff. An execution issued thereon, and at the sale thereunder plaintiff bought the two horses in dispute, leaving one of them with his debtor, and selling the other to one Pennington. A short time thereafter, G. W. Rose obtained judgment against Joseph R. Kitchen, execution issued thereon, and the defendant, as sheriff, after being indemnified, levied upon, took away, and sold the two horses for \$187.20. Before the horses were sold under the last execution, Pennington went to plaintiff, received the money which he had paid for the horse, and returned the receipt which had been given him when he paid for the horse. Plaintiff then notified the sheriff that he owned and claimed both the horses.

Frank Fielding, for the appellant.

S. V. Wilson and T. H. Murray, for the appellee.

GREEN, J. First and second assignments. There is no doubt that the transaction between Andrew L. Kitchen and Pennington after the levy, when Kitchen refunded to Pennington the money which Pennington had paid him for the horse, was a rescission of the sale of the horse by Kitchen to Pennington. As between them, Kitchen thereby became entitled to the possession of the horse, and also to the property in him. Pennington did not have the possession, as the horse

had been taken by the sheriff under his levy. When he accepted from Kitchen the money for the price of the horse, he no longer had any title in the horse, or any right of possession. The property in the horse, after the rescission, was vested again in Kitchen, and the right to have the possession followed the title, and could be asserted as against any wrongdoer. No actual delivery of possession by Pennington to Kitchen was necessary to perfect Kitchen's title: *Creps v. Dunham*, 69 Pa. St. 456. The authorities cited by the learned counsel of the appellant in his argument upon the first and second assignments are undoubtedly correct, and certainly apply in all cases, where there was a levy, and no change of title between the levy and the sale. But the sale, by the sheriff, of goods levied upon by him, and claimed by a stranger, is a distinct and substantial trespass, which entitles the real owner to his remedy by action of trespass. In the present case the sale was not made until after Pennington had parted with his title by the rescission of the contract of purchase between Kitchen and Pennington. He no longer had any kind of title in the horse, and Kitchen became the owner of any title which Pennington had prior to the act of rescission. As there is no other claimant of the title of Pennington, any right of action which he may have had passed to Kitchen by virtue of the rescission. It is clear that Pennington could maintain no action against the sheriff in such circumstances, and we know of no reason why Kitchen might not assert his right of property by an action based upon the act of trespass committed by the sheriff in selling the horse thereafter.

In the case of *Dixon v. White Sewing Machine Co.*, 128 Pa. St. 397, 15 Am. St. Rep. 683, we held that, to maintain trespass for a mere levy upon the goods of a stranger, the plaintiff must have had, at the time of the levy, either actual possession or the right to take possession, but for a sale of the goods an action may be supported upon a reversionary or conditional right of possession. In that case, Dinkle, as agent for the plaintiff claiming the goods, — organs, — had made conditional sales in the form of leases, under which the organs had been delivered to the proposed purchasers, and were in their possession at the time of the levy. They had been levied on by Dinkle's creditors, who claimed they were his property. The sheriff returned that he had levied on Dinkle's interest in them, and had sold only that interest, and it was claimed for the defendant, the sheriff, that as only Dinkle's interest was sold,

and that, at the time of the levy, the goods were in possession of other parties, the conditional purchasers, the action could not be maintained. Our brother Mitchell, meeting this objection, and recognizing the familiar doctrine that the plaintiff in an action of trespass must have the possession or right of possession at the time of the levy, said: "But Dinkle, either for himself, or as agent of the plaintiff, had still a title in the organs, to which a reversionary and conditional right of possession attached, and a sale of the goods themselves by the sheriff would be such an interference with this title and consequent right of possession as would support an action." This distinction is quite correct, and would seem to be applicable to the rather unusual facts that are present in this case. At the time of the levy, Pennington was the owner and in possession, and if there were no change in the situation, no action could have been maintained by Kitchen. But his action was not brought until after the sale by the sheriff, and at that time he, if he was the true owner of the horse, is the only person injured, and his injury was occasioned by the sale. Pennington had no interest of any kind, either in the possession, or in the property at the time of the sale, or at the time of the action brought. Kitchen was the owner, if his title were good, and being the only person injured, he was clearly entitled to bring the action. No action had been brought by any one for the disturbance of the possession by the levy; and as the sale was an undoubted trespass as against Kitchen, he alone had the right of action. The first and second assignments of error are not sustained.

Third and fourth assignments. The third point of the defendant is undoubtedly sound, and might have been affirmed as a mere abstract proposition. The only reason why it was not affirmed was because the learned court below was of opinion that there was no evidence in the cause which would have justified the submission to the jury of the question of fact which was involved in the point. After a most careful reading of the testimony, we are of opinion that the learned court was entirely correct in this view of the testimony. We really cannot see any foundation of fact in the testimony upon which to base either a charge of an intent, in the confession of the judgment, to hinder, delay, and defraud the creditors of Joseph Kitchen, or that there was fraud in fact, either in the giving of the judgment, or in the sale under the execution. There is not a scrap of testimony to impugn the full actual

consideration of the judgment. The magistrate who entered the judgment testified fully to every fact and circumstance attending its confession and entry. He said the defendant in the judgment called upon him and said he was indebted to his brother, A. L. Kitchen, that he could not pay him, and wanted to make as little costs as possible, and therefore he wanted to confess a judgment in his favor for the amount of the debt. The justice inquired as to the consideration, and was informed as to the whole of it, that the defendant owed his brother for three notes he held against him and a book-account. The amount was footed up, and judgment confessed for the whole. Afterwards, on the same day, he met the plaintiff, and inquired of him about it, and said he would require the notes to be delivered to him, the justice, as they were "docket property." On the same evening, A. L. Kitchen brought him the notes, and left them with him, and directed him to issue an execution the next day. The notes themselves were produced in court and given in evidence. They are all judgment notes, given at different times, for different sums, all of which were small, and executed under seal. One of them was given to the wife of A. L. Kitchen, and by her transferred to her husband. There was not a fragment of testimony in the cause to impeach the consideration of the notes or of the judgment. Being executed under seal, they imported consideration. We discover nothing in the circumstances attending the confession of the judgment in any degree suspicious or inconsistent with perfect good faith. It was the right of the defendant to confess the judgment in favor of his brother, if he honestly owed him the money, and equally the right of the brother to receive the confession and issue execution for the collection of the money, without being chargeable with fraud because the defendant was his brother.

In the case of *Reehling v. Byers*, 94 Pa. St. 316, Mr. Justice Gordon, in the case of a transfer of real estate from a son, nearly or quite insolvent, to his father, said: "Business dealings between parents and children and other near relatives are not *per se* fraudulent. They must be treated just as are the transactions between ordinary debtors and creditors. As in the latter case, where the *bona fides* of such transactions is attacked, the fraud alleged must be clearly and distinctly proved, so, likewise, in the former." The judgment of the court below was reversed because the question of fraud was

submitted to the jury, when, in the opinion of this court, there was no evidence sufficient to warrant such submission.

Some very trivial circumstances were claimed by the appellant in the present case to be evidence of fraud, such as the fact that Joseph R. Kitchen came to the office of the justice alone, and without any books and papers, when he confessed the judgment; that only a few persons were present at the sale, a part of whom were near relatives; that there was a dispute about one or two bids; that the horses sold were worth considerably more than they brought at the sale; and that the sale was completed in about twenty minutes. Such facts as these constantly transpire at judicial sales, but unless there is some kind of proof showing, or tending to show, actual fraud in the transaction, they are not of the slightest significance, and of themselves prove nothing worthy the consideration of a jury. The solemn judgments and executions of creditors are not to be swept away by any such testimony as this, without some kind of substantial proof. The third and fourth assignments are not sustained.

The fourth point of the defendant asked the court to charge that the constable's sale was void in law, because there were no persons present at the sale "but the plaintiff and defendant, who were brothers, and their brother and nephew, the constable and his clerk." As a matter of course, such a point could not have been affirmed without grave error, and it was therefore refused. In point of fact, other persons were present at the sale, and so testified. The fifth assignment is not sustained.

Sixth assignment. The only object of the offer to give other judgments against Joseph R. Kitchen in evidence was to show that he was in debt to other persons at the time he confessed the judgment. As the mere fact of other indebtedness would not invalidate, or even tend to invalidate, the judgment confessed to A. L. Kitchen, without some other evidence tending to impeach the good faith of the transaction, the offer was not competent. As we have often held, one who is in debt to different persons may give a preference to any one, and the fact of the other indebtedness weighs nothing against the validity of the preference. The sixth assignment is not sustained.

The court below was not asked to give a binding instruction for the defendant, and there is therefore nothing to sustain the seventh assignment.

Judgment affirmed.

TRESPASS AGAINST OFFICER FOR WRONGFUL LEVY OR SALE. — In an action for trespass for the wrongful seizure of plaintiff's goods by an officer, under a warrant issued against the goods of another at the suit of the defendant, he is not liable for the wrongful acts of the officer, without proof that he had authorized such acts: *Welsh v. Cochran*, 63 N. Y. 181; 20 Am. Rep. 519. In an action of trespass for wrongfully attaching and seizing goods, damages cannot be mitigated by proof of an offer to return the property next day: *Carpenter v. Dresser*, 72 Me. 377; 39 Am. Rep. 337. In an action against a sheriff for the conversion of plaintiff's goods, which had been sold by a deputy of defendant as the property of a third person, in whose possession they were found, an instruction that plaintiff could not recover unless before the sale he demanded the goods from the officer was properly refused, if the sale was made in good faith, since the defendant was not the levying officer upon whom a demand was made, and the evidence did not show that the goods were so mingled with those of a third person as not to be easily separated: *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529. When a sheriff, executing a writ of possession, removes from the premises a person not within the legal operation of the writ, he is guilty of official misconduct, and subjects himself and his sureties to an action on his bonds to the party injured: *Jefferson v. Hartley*, 81 Ga. 716. A sheriff is not liable for money rightfully in his hands, applied by him to an execution against the party to whom the money belonged, even though the execution was void by reason of matters unknown to the sheriff: *Goodgion v. Gilreath*, 32 S. C. 388. A sheriff who has sold property under an execution based upon a void judgment is a trespasser *ab initio*: *Palmer v. McMaster*, 10 Mont. 390. When an officer has levied upon property not subject to his writ, his indemnitors are jointly and severally liable as principals for the original undertaking: *Dyett v. Hyman*, 129 N. Y. 351; 26 Am. St. Rep. 533.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS — PREFERENCES — WHAT VOID AND WHAT NOT. — A chattel mortgage executed in good faith to a *bona fide* creditor is not necessarily fraudulent as to other creditors of the mortgagor, although it exhausts his property: *First Nat. Bank v. Ridenour*, 46 Kan. 718; 26 Am. St. Rep. 167, and note. Preference may be given by a failing debtor to any of his creditors for a *bona fide* debt, and the other creditors cannot complain: *Hage v. Campbell*, 78 Wis. 572; 23 Am. St. Rep. 422; *Patton v. Lestwich*, 86 Va. 421; 19 Am. St. Rep. 902, and note; *Britton v. Boyer*, 27 Neb. 522; *Hays v. Hostetter*, 125 Ind. 60; *La Belle Wagon Works v. Tidball*, 69 Tex. 161; *Foster v. Mullanphy etc. Mill Co.*, 92 Mo. 79. A failing debtor may prefer a *bona fide* debt due his wife: *Cooper v. First Nat. Bank*, 40 Kan. 5; *Cornell v. Gibson*, 114 Ind. 144; 5 Am. St. Rep. 605, and note; or one due his son: *Morehead Banking Co. v. Whitaker*, 110 N. C. 345. If a debtor assigns to a creditor a part of his assets, in a manner and for a purpose permitted by law in other respects, it does not matter that he afterwards made an assignment: *Ramsey v. Hurley*, 72 Tex. 194. A debtor may convey his property to a creditor to secure a *bona fide* debt, and if made in good faith, such a conveyance cannot be attacked by his other creditors: *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460; *Johnson v. McGrew*, 11 Iowa, 151; 77 Am. Dec. 137, and note; *Milburn v. Beach*, 14 Mo. 104; 55 Am. Dec. 91, and note; *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562. See *Peninsular Stove Co. v. Sacket*, 74 Wis. 526. Assignments of all the property of insolvent debtors, made to effect preferences, are void, under the statutes of Wisconsin: *Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257;

South Carolina: *Wilks v. Walker*, 22 S. C. 108; 53 Am. Rep. 706, and note; **Michigan:** *Kendall v. Bishop*, 76 Mich. 634; *Burnham v. Haskins*, 79 Mich. 35; **New Hampshire:** *Hurd v. Silsby*, 10 N. H. 108; 34 Am. Dec. 142, and note; and **New Jersey:** *Varnum v. Camp*, 13 N. J. L. 326; 25 Am. Dec. 476, and note. A debtor in failing circumstances, engaged in making a general assignment, cannot make valid preferences of certain of his creditors, by chattel mortgages or otherwise: *Wyeth Hardware Co. v. Standard Implement Co.*, 47 Kan. 423. See *Banks v. Omaha etc. Wire Co.*, 30 Neb. 128, and *Watkins Nat. Bank v. Sands*, 47 Kan. 591, for instances of fraudulent preferences.

BENJAMIN FRANKLIN'S ESTATE.

[150 PENNSYLVANIA STATE, 437.]

TRUSTS — LIABILITY OF MUNICIPALITY UNDER VOID TRUST. — When a municipal corporation receives a legacy upon a trust which is void, the trust fund is not impressed in the hands of the city with a trust in favor of the residuary legatees or the representatives of the testator, and the city, by virtue of its acceptance of the trust, does not become their trustee, and, as such, liable to account to them in the orphans' court.

TRUSTS — MUNICIPAL CORPORATION AS TRUSTEE. — In the absence of an express grant of power to accept and hold property upon purely private trusts, and to execute them, a municipal corporation has no power to do so. That the trust is a resulting one, and the consequent duties of the trustee are not necessarily dependent upon the intention either of the donor or trustee, but may be implied independently of and contrary to both, does not militate against this proposition.

TRUSTS — MUNICIPAL CORPORATION AS TRUSTEE. — The law will not resort to a fiction that will defeat its own policy, by converting into a trustee a municipal corporation from which it has, for the public good, withheld capacity to accept and administer the trust.

THIS controversy, between E. D. Gillespie and A. D. Bache as plaintiffs and residuary legatees, and the city of Philadelphia as defendant, arose over the following clause in the will of Dr. Benjamin Franklin: "I have considered that, among artisans, good apprentices are most likely to make good citizens, and having myself been bred to a manual art — printing — in my native town, and afterwards assisted to set up my business in Philadelphia by kind loans of money from two friends there, which was the foundation of my fortune, and of all the utility in life that may be ascribed to me, I wish to be useful even after my death, if possible, informing and advancing other young men, that may be serviceable to their country in both those towns. To this end I devote two thousand pounds sterling, of which I give one thousand thereof to the inhabi-

tants of the town of Boston, in Massachusetts, and the other thousand to the inhabitants of the city of Philadelphia, in trust, to and for the uses, intents, and purposes hereinafter mentioned and declared. The said sum of one thousand pounds sterling, if accepted by the inhabitants of the town of Boston, shall be managed under the direction of the selectmen, united with the ministers of the oldest Episcopalian, Congregational, and Presbyterian churches in that town, who are to let out the same, upon interest at five per cent per annum, to such young married artificers under the age of twenty-five years as have served an apprenticeship in the said town, and faithfully fulfilled the duties required in their indentures, so as to obtain a good moral character from at least two respectable citizens, who are willing to become their sureties, in a bond with the applicants, for the repayment of the moneys so lent, with interest, according to the terms hereinafter prescribed; all of which bonds are to be taken for Spanish milled dollars, or the value thereof in current gold coin; and the managers shall keep a bound book or books, wherein shall be entered the names of those who shall apply for and receive the benefits of this institution, and of their sureties, together with the sums lent, the dates, and other necessary and proper record respecting the business and concerns of this institution. And as these loans are intended to assist young married artificers in setting up their business, they are to be proportioned by the discretion of the managers, so as not to exceed sixty pounds sterling to one person, nor to be less than fifteen pounds, and if the number of appliers so entitled should be so large that the sum will not suffice to afford to each as much as might otherwise not be improper, the proportion to each shall be diminished so as to afford to every one some assistance. These aids may therefore be small at first, but as the capital increases by the accumulated interest, they will be more ample. And in order to serve as many as possible in their turn, as well as to make the repayment of the principal borrowed more easy, each borrower shall be obliged to pay, with the yearly interest, one tenth part of the principal, which sums of principal and interest so paid in shall be again let out to fresh borrowers. And as it is presumed that there will always be found in Boston virtuous and benevolent citizens willing to bestow a part of their time in doing good to the rising generation, by superintending and managing this institution *gratis* it is hoped that no part of the money will at any

time be dead, or be diverted to other purposes, but be continually augmenting by the interest, in which case there may, in time, be more than the occasions in Boston shall require, and then some may be spared to the neighboring or other towns in the said state of Massachusetts, who may desire to have it, such towns engaging to pay punctually the interest and the portions of the principal annually, to the inhabitants of the town of Boston. If this plan is executed, and succeeds as projected without interruption for one hundred years, the sum will then be one hundred and thirty-one thousand pounds, of which I would have the managers of the donation to the town of Boston then lay out, at their discretion, one hundred thousand pounds in public works which may be judged of most general utility to the inhabitants, such as fortifications, bridges, aqueducts, public buildings, baths, pavements, or whatever may make living in the town more convenient to its people, and render it more agreeable to strangers resorting thither for health or a temporary residence. The remaining thirty-one thousand pounds I would have continued to be let out on interest, in the manner above directed, for another hundred years, as I hope that it will have been found that the institution has had a good effect on the conduct of youth, and been of service to many worthy characters and useful citizens. At the end of this second term, if no unfortunate accident has prevented the operation, the sum will be four millions and sixty-one thousand pounds sterling, of which I leave one million sixty-one thousand pounds to the disposition of the inhabitants of the town of Boston, and three millions to the disposition of the government of the state, not presuming to carry my views further. All the directions herein given respecting the disposition and management of the donation to the inhabitants of Boston, I would have observed respecting that to the inhabitants of Philadelphia, only as Philadelphia is incorporated, I request the corporation of that city to undertake the management agreeably to the said direction, and I do hereby vest them with full and ample powers for that purpose. And having considered that the covering a ground-plat with buildings and pavements, which carry off most of the rain, and prevent its soaking into the earth and renewing and purifying the springs, whence the waters of the wells must gradually grow worse, and in time be unfit for use, as I find has happened in all old cities, I recommend that at the end of the first hundred years, if not done before, the corporation of the

city employ a part of the one hundred thousand pounds in bringing, by pipes, the water of Wissahickon Creek into the town, so as to supply the inhabitants, which I apprehend may be done without great difficulty, the level of that peak being much above that of the city, and may be made higher by a dam. I also recommend making the Schuylkill completely navigable. At the end of the second hundred years I would have the disposition of the four million and sixty-one thousand pounds divided between the inhabitants of the city of Philadelphia and the government of Pennsylvania in the same manner as herein directed with respect to that of the inhabitants of Boston and the government of Massachusetts. It is my desire that this institution should take place and begin to operate within one year after my decease, for which purpose due notice should be publicly given previous to the expiration of that year, that those for whose benefit this establishment is intended may make their respective applications. And I hereby direct my executors, the survivors or survivor of them, within six months after my decease, to pay over the said sum of two thousand pounds sterling to such persons as shall be duly appointed by the selectmen of Boston and the corporation of Philadelphia to receive and take charge of their respective sums of one thousand pounds each for the purposes aforesaid. Considering the accidents to which all human affairs and projects are subject in such a length of time, I have perhaps too much flattered myself with a vain fancy that these dispositions, if carried into execution, will be continued without interruption and have the effects proposed. I hope, however, that if the inhabitants of the two cities should not think fit to undertake the execution, they will at least accept the offer of these donations as a mark of my good-will, a token of my gratitude, and a testimony of my earnest desire to be useful to them after my departure. I wish, indeed, that they may both undertake to endeavor the execution of the project, because I think that, though unforeseen difficulties may arise, expedients will be found to remove them, and the scheme be found practicable. If one of them accepts the money with the conditions, and the other refuses, my will then is, that both sums be given to the inhabitants of the city accepting the whole, to be applied to the same purposes and under the same regulations directed for the separate parts, and if both refuse, the money, of course, remains in the mass of my estate,

and is to be disposed of therewith according to my will made the seventeenth day of July, 1788."

Russell Duane, George Wharton Pepper, and John Chipman Gray, for the appellants.

F. C. Brewster and Francis E. Brewster, for the appellee.

HEYDRICK, J. The ground upon which the appellants invoked the jurisdiction of the orphans' court was, that the city of Philadelphia having received a legacy from the executors of Dr. Franklin under a void bequest, a trust thereupon resulted in favor of his residuary legatees as to the money so received, of which the city, *ipso facto*, became trustee, and, as such, subject to the jurisdiction of that court. It is not denied that the city received the legacy upon the trusts declared in the will of Dr. Franklin, and it may be admitted for the present purpose that the trust for accumulation was illegal, and the bequest for that reason void. It does not, however, necessarily follow that the fund was impressed, in the hands of the city, with a trust in favor of the residuary legatees or the legal representatives of the testator, or that the city, in virtue of its acceptance of it, became a trustee for the appellants, and, as such, liable to account to them in the orphans' court. The relation of trustee and *cestui que trust* involves duties, obligations, and liabilities upon the one side, as well as rights upon the other, and therefore it is that the question whether that relation has been established must depend primarily upon a question of capacity or passive power to accept the trust and assume the obligations inseparable from it. Accordingly, it has been laid down generally that a trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust: 1 Lewin on Trusts, c. 3, sec. 2. If the city of Philadelphia had not capacity to take the fund and administer it for the benefit of the residuary legatees of Dr. Franklin, it could not, and never did, become their trustee in respect to it. A municipal corporation, like a private corporation, is a legal entity, existing only in contemplation of law and in virtue of law. Being the creature of law, it can have only these capacities which are imparted, and exercise only those powers which are expressly or by necessary implication granted, to it. Its objects being governmental, its appropriate functions are all necessarily governmental. In the absence, therefore, of an

express grant of power to accept and hold property upon purely private trusts, and to execute such trusts, it can no more do so than can a nonentity. Indeed, as to everything *dehors* its legitimate field of operations, it is as if it were not. Instances are not wanting in which municipal corporations have executed trusts committed to them by private persons, but these have been for public purposes, germane to the objects of the corporation, and they have been upheld for that reason. Commenting upon *Gloucester v. Osborn*, 1 H. L. Cas. *272, in which it was said that a municipality may take and hold for purposes altogether private, Sharswood, J., said, in *Philadelphia v. Fox*, 64 Pa. St. 169: "But the administration of such trusts, and the consequent liabilities incurred, are altogether inconsistent with the public duties imposed upon the municipality. It could hardly be pretended, I think, in this country, that it could be a trustee for the separate use of a married woman, to educate the children of a donor or testator, or to accumulate for the benefit of particular persons. It certainly is not compellable to execute such trusts, nor does it seem competent to accept and administer them." The same thought was evidently in the mind of the court in *Mayor v. Elliott*, 3 Rawle, 170.

It has not been shown that the city of Philadelphia was expressly authorized by its charter to accept and administer trusts for other than public purposes germane to the objects for which it was created; and as its agents could not commit it beyond the scope of its powers, which is necessarily the utmost limit of their powers, it follows that when they received the legacy from Dr. Franklin's executors they did not thereby and for it accept a trust in favor of the residuary legatees. That a resulting trust and the consequent duties of the trustee are not necessarily dependent upon the intention of either the donor or trustee, but may be implied independently of and contrary to both, does not militate against this proposition. Where a trust is implied contrary to intention, as would be the case here, the implication is a fiction of the law, invented to prevent a failure of justice. But the law will not resort to a fiction that will defeat its own policy, by converting into a trustee a municipal corporation from which it has, for the public good, withheld capacity to accept and administer the trust. The relation of trustee and *cestui que trust* never having been established between the city of Philadelphia and the residuary legatees, it follows that the orphans' court has not

jurisdiction to compel the former to account to the latter. This view renders it unnecessary to consider the other questions, which were argued with great ability and learning by the counsel of the respective parties.

The decree of the court below dismissing the appellants' petition is affirmed.

MUNICIPAL CORPORATIONS AS TRUSTEES. — Under its charter, the city of Baltimore has the power to accept and hold in trust any property for educational and charitable purposes: *Barnum v. Mayor*, 62 Md. 275; 50 Am. Rep. 219, and note. Towns, under the laws of New York, are considered corporations for certain purposes, and the authority conferred on them to make regulations respecting their common lands, of itself, is sufficient to give them capacity to take and hold common lands: *North Hempstead v. Hempstead*, 2 Wend. 110. In *Jackson v. Hartwell*, 8 Johns. 422, it was held that the supervisors of a county could take land in trust for the purpose of erecting a courthouse and jail. A city, in its corporate capacity, may act as trustee of a fund left by will in trust, the income thereof to be expended in the purchase of fuel, to be given, or sold at low prices, to industrious and worthy persons not supported at public expense, but who need aid: *Webb v. Neal*, 5 Allen, 575. The corporation of the city of Philadelphia, having power under its charter to take real and personal estate by deed and by devise, can also take it in trust: *Vidal v. Mayor*, 2 How. 126. But in *Perin v. McMicken*, 15 La. Ann. 154, it was held that a disposition in a will having for its object the foundation and maintenance of colleges under the administration of a municipal corporation as trustee forever is prohibited.

WAVERLY NATIONAL BANK v. HALL.

[150 PENNSYLVANIA STATE, 466.]

CONFLICT OF LAWS. — MATTERS CONNECTED WITH THE PERFORMANCE of a contract are regulated by the law prevailing at the place of performance.

CONFLICT OF LAWS — PLACE OF PERFORMANCE — PARTNERSHIP. — When, under the law of one state, one who has no interest in the business of a firm or in the capital invested, save that he is to receive a share of the profits as compensation for services, or for money loaned for the benefit of the business, is not a partner, and cannot be held liable as such by a creditor of the firm, a contract involving this question, and to be performed in that state, will receive a like construction when brought in question in another state.

PARTNERSHIP — SHARING IN PROFITS AS CREATING. — When one party agrees, in writing, with another, in consideration of a share of the profits in a business in which the latter is to embark, and not as a contribution to the capital of a partnership, to furnish him with a certain sum of money, from time to time, its repayment to be secured by chattel mortgage, with an option to repay before the expiration of the full term in which it may be demanded, the party thus furnishing the money to have no control of the business, in which there is to be no partnership except as

to the profits, such agreement does not create a partnership as to third persons, but merely creates the relation of borrower and lender between the parties to it.

Rodney A. Mercur and Edward Overton, for the appellant.

D'A. Overton and John C. Ingham, for the appellee.

HEYDRICK, J. The plaintiff sues upon notes made by C. M. Crandall, one of the defendants, in his own name, and seeks to charge the other defendants as partners of Crandall in a business in which the proceeds of certain other notes, of which these were renewals, were used. The evidence relied upon to establish the alleged partnership is a contract, in writing, between Crandall of the one part, and the other defendants of the other part, dated February 24, 1885. If this contract does not create a partnership as to creditors, it cannot be successfully contended that all the evidence in the cause, taken together, tends to charge anybody but Crandall; and inasmuch as all the assignments of error are predicated upon the assumption that such partnership was created by that contract, it is evident that if that assumption was unfounded, the plaintiffs could not have been injured by the rulings complained of, and hence, though there may have been technical error therein, the judgment ought not to be disturbed. It is therefore pertinent to inquire what were the rights and liabilities of the parties under that contract, although the question is not directly raised by any of the assignments of error.

The whole scope of the contract indicates that a loan of money to Crandall by the other parties, in consideration of a share of the profits of a business in which he was to embark was intended, and not a contribution to the capital of a partnership of which the parties were to be the members. The parties of the second part covenanted to furnish three thousand dollars to Crandall, and not to a firm; they were to furnish it to him, from time to time, as he might require it, and its repayment to them was to be secured by a chattel mortgage upon the tools, machinery, furniture, and fixtures of every kind and nature belonging to or connected with the business in which it was to be used. Crandall might repay it, at his option, before the expiration of the full term for which he had the right to demand it; and although it was stipulated that the money so to be furnished should be used in the business contemplated, the right of entire control of that business was recognized to be in, and was expressly conceded to, Crandall;

and it was further stipulated that nothing in the writing contained should be construed to create a partnership between the parties thereto except as to the profits of the business. These provisions are all consistent with the relation of borrower and lender, and some of them are inconsistent with any other relation. It is therefore manifest that that relation was intended to be established; and the next question is, whether in spite of the intention of the parties, the community of interest in the profits constituted them a partnership as to creditors.

If this were a Pennsylvania contract, the question would be answered in the negative by the act of April 6, 1870 (P. L. 56), and by *Hart v. Kelley*, 83 Pa. St. 286. But although it was made in this state, it was to be executed in the state of New York. Such cases are stated by approved text-writers to be an exception to the general rule that the *lex loci* applies in respect to the nature, obligation, and construction of contracts. That exception is thus stated by Judge Story: "But where the contract is either expressly or tacitly to be performed in any other place, the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance": Story on Conflict of Laws, sec. 280. Chancellor Kent, after stating the exception in substantially the same terms, adds that it "is more embarrassed than any other branch of the subject [the *lex loci*] by distinctions and jarring decisions": 2 Kent's Com. 459. But whatever conflict of authority there may be in respect to the exception, all agree that matters connected with the performance of a contract are regulated by the law prevailing at the place of performance: *Brown v. Camden etc. R. R. Co.*, 83 Pa. St. 316; *Scudder v. Union Nat. Bank*, 91 U. S. 406. Under the present contract, it is clear there could be no liability to third persons without a performance as between the parties to it, and therefore the question of such liability would necessarily be connected with or grow out of such performance, and be determinable by the law of New York.

More than a century ago, Chief Justice De Grey, in *Grace v. Smith*, 2 W. Black. 998, laid down the proposition that "every man that has a share of the profits of a trade ought also to bear his share of the loss." In a few years the principle thus stated became recognized as a part of the law of England, and so continued until 1860, when it was overthrown by the house

of lords in *Cox v. Hickman*, 8 H. L. Cas. 268. On this side of the Atlantic, and especially in the state of New York, it was accepted without question, so far as I have observed, as to the soundness of the reasons put forth in support of it, until it was exploded in England. As early as 1819, Spencer, J., delivering the opinion of the court in *Walden v. Sherburne*, 15 Johns. 409, said: "No principle is better established than that every person is deemed to be in partnership, if he is interested in the profits of a trade, and if the advantages which he derives from the trade are casual and indefinite, depending on the accidents of trade." And although the judgment of the house of lords in *Cox v. Hickman*, 8 H. L. Cas. 268, was soon followed by many American courts, the New York court of appeals declared, as late as 1874, in *Leggett v. Hyde*, 58 N. Y. 272, 17 Am. Rep. 244, that the rule remained in that state as it had long been. But while the judgment of the court sustained the rule, the opinion of the learned judge who pronounced it betrayed dissatisfaction with it, and attempted to defend it on no other principle than that of *stare decisis*, and the chief justice dissented from the judgment itself. The question came before the court of appeals again in *Richardson v. Hughitt*, 76 N. Y. 55; 32 Am. Rep. 267. In that case the defendant had entered into a contract, in writing, with a firm engaged in the business of manufacturing wagons, by the terms of which they were to manufacture and deliver wagons to him and use their best efforts to sell them. He was to advance fifty dollars on each wagon, to be paid on the first day of each month, and at the time of each advance the firm was to render him an account of sales of wagons during the previous month, and pay him one quarter of the net profits thereon, with interest on the advances. This instrument was construed to be a contract for the loan of money, and not to constitute a partnership. This was followed by *Curry v. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343, in which it appeared that certain persons, having purchased vacant ground in the city of New York, and being about to erect buildings thereon, entered into a written contract with Fowler, by the terms of which he was to advance fifty thousand dollars towards the purchase and erection of the buildings, in consideration of which they "agreed to share the profits of the said purchase and buildings with the said Fowler," and he was to be allowed interest on his advances, and be secured by bond and mortgage on the premises. This contract was held not to create any other re-

lation than that of borrower and lender, the same judge who delivered the opinion of the court in the case last cited saying: "In *Richardson v. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267, it was held by this court that a person who has no interest in the business of a firm or in the capital invested, save that he is to receive a share of the profits as a compensation for services, or for money loaned for the benefit of the business, is not a partner, and cannot be held liable as such by a creditor of the firm." This language was repeated with approval in *Casidy v. Hall*, 97 N. Y. 159. It is said, however, in *Hackett v. Stanley*, 115 N. Y. 625, that these cases, and others in harmony with them, do not overrule *Leggett v. Hyde*, 58 N. Y. 272, 17 Am. Rep. 244, and its predecessors. But while this is affirmed, it is said in the same case that "exceptions to the rule [that participation in profits of a business renders the participant liable to creditors] are, however, found in cases where a share in profits is contracted to be paid as a measure of compensation to employees for services rendered in the business, or for the use of moneys loaned in aid of the enterprise." It is not material to inquire how much more of the rule is left by this exception than was left by *Cox v. Hickman*, 8 H. L. Cas. 268. It is enough that the present case comes within the letter and the spirit of the exception. The parties who made the loan, and who are now sought to be held liable as partners, had no voice or part in the prosecution of the business, either as principals or otherwise, nor had they an irrevocable right to demand a share of the profits, as was the case in *Hackett v. Stanley*, 115 N. Y. 625. The right of control, or any voice in the control,—an incident of proprietorship,—was denied to them. And the implication of partnership from community of interest in the profits was excluded by an express stipulation, the absence of which, in *Hackett v. Stanley*, 115 N. Y. 625, was thought to be worthy of notice; and their right to demand a share of the profits was to terminate upon repayment of the money advanced at the end of five years, or sooner, at the option of Crandall. In all its material provisions the contract under consideration is not distinguishable from that in *Curry v. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343, or from those provisions of the contract in *Hackett v. Stanley*, 115 N. Y. 625, which it is there conceded would create no other relation than that of borrower and lender. For these reasons, the defendants as to whom issue was joined are not liable to the plaintiff, and therefore the judgment must be affirmed.

CONFLICT OF LAWS — CONTRACTS, WHEN GOVERNED BY PLACE OF PERFORMANCE. — The law of the place of performance governs as to the enforcement of contracts: *Burchard v. Dunbar*, 82 Ill. 450; 25 Am. Rep. 334. A contract will be governed by the law of the place of performance, though made in another country: *Galliano v. Pierre*, 18 La. Ann. 10; 89 Am. Dec. 643, and note; *Stricker v. Tinkham*, 35 Ga. 176; 89 Am. Dec. 280, and note; *Lewis v. Heulley*, 36 Ill. 433; 87 Am. Dec. 227, and note; *Smith v. Smith*, 2 Johns. 235; 3 Am. Dec. 410, and note; *Malpica v. McKown*, 1 La. Ann. 248; 20 Am. Dec. 279, and note. A contract is governed and construed by the laws of the state where it is to be performed: *Larrabee v. Talbot*, 5 Gill, 426; 46 Am. Dec. 637; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 27. Where insurance was effected in a state, and the policy was countersigned and delivered by an agent residing there, and the money due on the policy was there paid, the law of that state controls as to the right of the insured to dispose of such policy by will, although a foreign corporation issued the policy: *Estate of Breitung*, 78 Wis. 33. The validity of a contract should be determined by the laws of the state in which it was made and was to be performed: *Forpaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672, and note; *Sontheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23, and note; *Spears v. Shropshire*, 11 La. Ann. 559; 66 Am. Dec. 206, and note; *May v. Breed*, 7 Cush. 15; 54 Am. Dec. 700, and note. See note to *Aymar v. Sheldon*, 21 Am. Dec. 141; note to *Arayo v. Currell*, 20 Am. Dec. 293.

PARTNERSHIP — AGREEMENTS BETWEEN PARTIES NOT CONSTITUTING. — A partnership, even as to third persons, is not constituted by the mere fact that two more persons participate or are interested in the net proceeds of a business: *Morgan v. Farrel*, 55 Conn. 413; 18 Am. St. Rep. 282, and note. When two persons do not hold themselves out to the public as partners, and there is an agreement between them that they are not to be partners, the fact that the business is conducted in the name of one, and the other is to receive one half the net profits and be charged with a similar proportion of the losses so long as they do not exceed the profits, does not constitute them partners: *Macy v. Combs*, 15 Ind. 469; 77 Am. Dec. 103, and note. A partnership is not created by the fact that one party agrees to furnish the goods and pay the expenses, and the other agrees to transact the business for half the profits as compensation: *Bradley v. White*, 10 Met. 303; 43 Am. Dec. 435, and note; *Haycock v. Williams*, 54 Ark. 384; *Clark v. Barnes*, 72 Iowa, 563. The fact of a party advancing money to pay the wages of the employees of a commercial partnership, and discharging its other expenses, does not constitute him a partner: *Greend v. Kummel*, 41 La. Ann. 65. Renting a saloon for a share of the profits of the business does not make the parties partners: *Thayer v. Augustine*, 55 Mich. 187; 54 Am. Rep. 361, and note. An agreement between two members of a partnership and a third person, with the assent of the other partners, that such person shall share in the profits and losses of the two contracting partners in the business, does not make such person a partner: *Burnett v. Snyder*, 81 N. Y. 550; 37 Am. Rep. 527. The reception of profits is not necessary to make one a partner; it is the agreement to receive that is the test: *Reab v. Pool*, 30 S. C. 140. See *Mayo v. Moritz*, 151 Mass. 481. An agreement by two persons to contribute equally to a common fund, to be used by a third person in purchasing stocks for their joint benefit, does not constitute them partners between themselves, in the absence of an agreement to assume such relation: *Keller v. Swartz*, 137 Pa. St. 65. A contract, in writing, between a real estate agent and the owner of land, the former to advertise and sell the land, and to receive as

compensation therefor a share in the profits arising from the sale, is a contract of agency, and not of partnership: *Durkee v. Gunn*, 41 Kan. 496; 13 Am. St. Rep. 300.

The loan of money to be invested in trade, the borrower to have half the net profits, does not constitute a partnership: *Culley v. Edwards*, 44 Ark. 423; 51 Am. Rep. 614; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3; *Williams v. Fletcher*, 129 Ill. 356; *Smith v. Knight*, 71 Ill. 148; 22 Am. Rep. 94, and note. A partnership agreed with H. to make two hundred wagons for him, he advancing fifty dollars on each, the wagons to be sold, and H. to receive one fourth of the profits, and interest on the advances. It was held that such an arrangement would not constitute H. a partner: *Richardson v. Hughitt*, 76 N. Y. 55; 32 Am. Rep. 267. See note to *Sodiker v. Applegate*, 49 Am. Rep. 255.

COOPER'S ESTATE.

[150 PENNSYLVANIA STATE, 576.]

PERPETUITIES. — TRUST CREATED BY WILL IS NOT ILLEGAL as a restraint upon alienation, when a vested interest passes to the devisee, which he can sell or dispose of at pleasure, and it is only the time of enjoyment of the profits of the devise which is postponed. The mere fact that no time is fixed within which the power of sale must be exercised does not of itself create a perpetuity, as it must be exercised within a reasonable time; and this is especially so when it is competent, under the trust, for all parties in interest to unite at any time to defeat such power, and take the property discharged thereof.

PERPETUITIES — TRUST CREATED BY WILL. — When a testatrix, by her will, bequeaths her property to her children, share and share alike, subject to the control of her son, whom she appoints her executor and trustee to manage the property, collect the income, sell the real estate at private or public sale, and when two thirds of the persons interested in the estate shall so demand, to sell the property and divide the proceeds among those interested under the provisions of the will, an active trust is thereby created, for a lawful purpose, not in conflict with the law in respect to perpetuities.

John G. Johnson, for the appellant.

T. B. Stork, for the appellee.

PAXSON, J. While this is a close case, we are of opinion that the auditing judge was correct in his conclusions, and that the court below erred in overruling him. I understand it to be conceded that the trust created by the will of Emily W. Cooper was an active trust, and that its purpose was entirely legitimate. The *cestui qui trustent*, with a single exception, are willing that the trusts shall be carried out as directed by the testatrix. The learned court below, however, held that it could not be done, because it was in contravention

of two legal principles. One is that the trust is ingrafted upon a fee, and the other is that it creates a perpetuity. The important clause of said will is as follows: "I give, devise, and bequeath all my property, real, personal, or mixed, of whatsoever nature or description, to my children who may be living at the time of my death, share and share alike; if any one of my children shall have died before me, leaving children, then the share of such a one shall go to such children; all the said property to be subject to the control of my executor and trustee, as hereinafter set forth."

By the next clause in her will the testatrix appoints her son (appellant) executor of her will, and "trustee of all my property, real, personal, or mixed." She then proceeds to confer upon her executor and trustee certain powers in regard to the management of the real estate, the particulars of which I need not specify further than to say that he is authorized to receive the rents, pay debts and encumbrances, to sell the real estate at either public or private sale, and generally to "do everything whatsoever which may be requisite and necessary in reference to the management" thereof, and when "two thirds of the persons interested in my estate shall so demand, to sell my property, real or personal, and divide the proceeds among those interested under the provisions of this will."

It will be noticed that the estate is impressed with the trust by the same paragraph which contains the devise to the children. We think the intention of the testatrix, as gathered from the four corners of the will, was accurately stated by the auditing judge, in the following paragraph of his opinion: "While she bequeaths and devises all her estate unto her children living at her death, and the children of any who were dead leaving children, yet she did not intend to give them an absolute vested interest, payable to them, and to the possession of which they shall be immediately entitled, upon her death. But this vesting in possession she postponed until two thirds of the persons interested in her estate shall demand a final distribution, in which event the executor and trustee shall convert all her estate into cash, and divide among those interested under the will. Until this event occurs, however, she placed all her property under the control of her executor, whom she expressly appoints as trustee."

It being clear from the terms of the will that it was the intention of the testatrix to create a trust for a lawful purpose, and for the management of the estate, the court ought not to

interfere, unless it involves a violation of an inflexible rule of law. The manner in which the trust is imposed is not material, if the intention can be clearly gathered from the will. No particular form of words is necessary to create a trust. It was said by Lord Eldon in *King v. Denison*, 1 Ves. & B. 273, that the word "trust" not being made use of is a circumstance to be attended to, but nothing more, and if the whole frame of the will created a trust, for the particular purpose of satisfying which the estate is devised, the law is the same, though the word "trust" is not used. In *Vaux v. Parke*, 7 Watts & S. 19, there was an absolute gift, which was cut down to a spendthrift trust by a subsequent clause of the will, and this was held valid. In *Briggs v. Davis*, 81½ Pa. St. 470, a trust was imposed after an absolute devise. We do not regard this trust as in any way an illegal restraint upon alienation, for the reason that there is a vested interest in the devisee, which he can sell or dispose of at pleasure, and it is only the time of enjoyment of the profits of the same which is provided for.

We are unable to see anything in this trust which is in conflict with the law in regard to perpetuities. The mere fact that no time is fixed within which the power of sale must be exercised does not of itself create a perpetuity. It is sufficient to say that a power to sell and distribute the proceeds, created by a will, must be exercised within a reasonable time. It is always within the power of the orphans' court to control the exercise of a discretion, in such cases, upon the application of the parties in interest. A power of sale is good, although no time be limited for its exercise: *Marshall's Estate*, 138 Pa. St. 260. Aside from this, it was competent for all the parties in interest at any time to defeat the power, and to take the property discharged thereof. Under these circumstances, we cannot say that the trust created a perpetuity.

It is not necessary to discuss the case further, in view of the well-considered opinion of the auditing judge.

The decree is reversed, at the costs of the appellee, the adjudication is affirmed, and distribution ordered in accordance therewith.

PERPETUITIES — TRUST CREATED BY WILL, WHEN NOT ILLEGAL AS — Provisions in a will, requiring a trustee to hold and manage the trust property until the beneficiary reaches the age of twenty-one years, are not necessarily void, if the interest of the beneficiary is vested or absolute: *Claffin v. Claffin*, 149 Mass. 19; 14 Am. St. Rep. 393, and note; *Goldtree v. Thompson*, 79 Cal. 613. In *Henderson v. Henderson*, 113 N. Y. 1, it was held that no

unlawful perpetuity was created by authorizing an executor to delay partitioning the estate for five years, as the power of sale was not suspended. In this connection, see *Van Brunt v. Van Brunt*, 111 N. Y. 178. See extensive note to *Barnum v. Barnum*, 90 Am. Dec. 101, discussing perpetuities, which are forbidden in the United States. See also note to *Lawrence's Estate*, 29 Am. St. Rep. 931.

O'BRIEN v. PHILADELPHIA.

[150 PENNSYLVANIA STATE, 589.]

MUNICIPAL CORPORATIONS — DAMAGES FOR CHANGE IN GRADE OF STREET.

— A property owner who has built a house upon his lot in conformity with the existing physical grade of an old and open highway can recover damages from a city for depreciation in the value of the property, caused by changing the existing physical elevation of the highway in front of the lot to conform to a plan or regulation legally confirmed after the building of the house, such plan being the first regulation of grade, and differing from the existing physical elevation of the old highway in front of the lot.

E. S. Miller and Charles B. McMichael, assistant city solicitors, and Charles F. Warwick, city solicitor, for the appellant.

Thomas Leaming and Henry C. Terry, for the appellee.

STERRETT, J. For many years prior to commencement of this suit, plaintiff owned a house and lot fronting on Haines Street, between Stenton Avenue and Limekiln Pike, now in the twenty-second ward of Philadelphia. Prior to 1761, what is now Haines Street was an old road. In that year a jury of view, appointed by the court of quarter sessions, reported said road, with courses, etc., but without any fixed grade, as a public highway, and in September of same year their report was duly confirmed by said court. Subsequently, the natural surface of the land on which the road was located was somewhat changed, and the grade of the road thereby improved. As a public highway, this road has been continuously traveled ever since, and, from time to time, detached dwellings, fronting upon it, have been erected. Meanwhile, the territory, on part of which the road was located, was absorbed by the city, and is now part of said ward. In 1871, more than a century after said road was recorded as a public highway, a plan of that section of the city embracing that part of said road now called Haines Street, on which plaintiff's property is located, was presented and confirmed. By that plan, a grade of the street, differing materially from the traveled

grade, was prescribed. This first-established paper grade called for raising Haines Street, opposite plaintiff's house, which was erected before said plan was confirmed.

In 1888, Haines Street was physically graded so as to conform to the grade established, as aforesaid, in 1871. By that act of the city the street opposite plaintiff's house was so raised as to leave his house considerably below the changed surface of the street. For the injury thus sustained by plaintiff this suit was brought, and a verdict rendered in his favor for \$240, subject to the opinion of the court below on the following question of law reserved: "Whether a plaintiff who has built a house upon his lot in conformity with the existing physical grade of an old and open public highway can recover damages from the city of Philadelphia for depreciation in the value of the property, occasioned by changing the *de facto* physical elevation of the highway in front of the lot to conform to a plan regulation legally confirmed after the building of the house, said plan being the first regulation of grade, and differing from the *de facto* physical elevation of the old highway in front of the lot."

Defendant's motion for judgment in its favor, *non obstante verdicto*, was afterwards denied, and judgment for plaintiff was entered on the verdict. The sole question presented by the two specifications is, whether the court erred in denying defendant's motion, and entering judgment for plaintiff.

On the trial the evidence was directed to the difference in the value of plaintiff's property before and after the raising of the natural grade, as affected by that act. It was also agreed that no objection based on the form of action should be made. The only question before us, therefore, is that presented by the action of the court in entering judgment for the plaintiff on the verdict, etc., as above stated.

If any regard is to be had for the constitutional mandate that "municipal and other corporations . . . shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements," we are at a loss to see how the learned judge could do otherwise than decide the reserved question as he did. Nobody conversant with the history of the constitutional provision above quoted can entertain any doubt that it was intended to provide, *inter alia*, for the class of cases of which *O'Connor v. Pittsburgh*, 18 Pa. St. 187, is a conspicuous example. It has uniformly been so regarded from the date

of its adoption until the present time. It is a fact, conclusively established by the verdict, that, as a direct consequence of the elevation of grade immediately in front of plaintiff's property, its market value was lessened at least to the extent of \$240; but it is gravely suggested that "such a *damnum* is not necessarily an *injuria*," and hence plaintiff is remediless. That principle has no application to the class of cases to which this belongs. To hold that it has would defeat one of the objects of the constitutional mandate in question, and virtually overrule several well-considered cases. We do not propose to do either. In *New Brighton Borough v. United Presbyterian Church*, 96 Pa. St. 831, it was contended that inasmuch as the proprietor of a borough had laid it out into lots and streets, and the borough had never fixed the grade of a particular street, it was not liable for damages for grading it the first time; but it was held that, under the constitutional provision above quoted, etc., owners of lots are to be compensated for damages resulting from changing the grade of a street, and that a change from the natural grade was such a change as entitled them to damages, if any were sustained thereby.

Again, in *New Brighton Borough v. Peirsol*, 107 Pa. St. 280, the claim was by a lot-owner for a second change of grade after he purchased the lot. This court, holding that he was entitled to recover, said: "The claim now is for change of grade, made since defendant in error purchased, and for damages sustained by work done since the adoption of the constitution."

In *Ogden v. Philadelphia*, 143 Pa. St. 430, the claim was for damages caused by grading North Street. After stating the undisputed facts were "that the first grade was established on the city plan in 1871, but nothing was done on the ground until 1887," our brother Mitchell says: "For the establishment of the grade of 1871 there was no right of action: *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Philadelphia v. Wright*, 100 Pa. St. 235. Therefore the statute of limitation could not begin to run from that date. But the constitution of 1874 (art. 16, sec. 8) gave a right to owners to have compensation for property injured, as well as for property taken by municipal and other corporations in the construction or enlargement of their works. The right of action which this section gives is clearly for the actual establishment of the grade on the land. The general rule is, that the cause of action arises when the injury is complete, and this has been uniformly applied, to

the taking of the property for public use, from the case of *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 411, down to the present day, etc. . . . There is nothing in the constitutional provision which indicates an intent to depart from the general rule under which, in the present case, the cause of action could not arise until the actual cutting down of the ground in 1887."

Jones v. Borough of Bangor, 144 Pa. St. 638, is to the same effect. In that case our brother McCollum, speaking for the court, said: "Injuries to abutting property, caused by a change of grade, an alteration or enlargement of the street, do not necessarily result from the opening of it to public travel. It is true that in a proceeding to recover damages caused by the opening and grading of a street the party must submit his whole claim, embracing consequential as well as direct injuries, but, 'where the grading occurs as a separate act of the public authorities, and so long after the opening of the street that the assessment of damages at the time of the appropriation cannot include those resulting from the grading, the latter may be ascertained by a second view': *Pusey v. Allegheny City*, 98 Pa. St. 522."

We have no doubt that the plaintiff's case was clearly within the constitutional mandate, and hence there was no error in entering judgment in his favor for the amount of damages found by the verdict of the jury.

Judgment affirmed.

Streets, Change of Grade, Liability of Cities for.*

Common-law Doctrine. — Numerous decisions of the courts of last resort in most of the states have absolutely settled the doctrine that municipal corporations, acting under authority conferred upon them by the legislature to grade and to change the established grade or level of their streets, incur no common-law or implied liability, though the exercise of the power may be injurious to adjoining property owners. A municipal corporation is not liable for consequential damages to abutting land-owners, arising from grading or changing the grade of its streets, provided that in so doing it keeps within the limits of the street, and does not trespass upon or invade private property, and exercises reasonable care and skill in the performance of the work resolved upon, unless there is some provision in the state constitution, in the city charter, or in some statute creating such liability. This is so, although the street is depressed or raised below or above the abutting property, in conforming it to the grade line, so as to cut off or render difficult the access to the adjoining property from the street, or to the street

*REFERENCE TO MONOGRAPHIC NOTES.

Municipal corporations, liability of, for grading or regrading streets: 7 Am. Rep. 299; 43 Am. Dec. 723, 725; 4 Am. St. Rep. 401.

from such property, and although the grade of the street has been before established, and buildings have been erected and improvements made on the abutting property with reference to such established grade: *Note to Shecky v. Kansas City Cable R'y Co.*, 4 Am. St. Rep. 491, citing many cases. This rule does not apply to those changes in the grade of a street by which the flow of a natural watercourse is obstructed or accelerated, to the injury of a lot-owner, nor to any scheme or plan by which surface waters are concentrated and thrown upon a lot in greatly increased quantities: See *ante*, pp. 390-395.

Liability under Constitutional Provisions. — It is also well settled that, under a constitutional provision guaranteeing that private property shall not be "taken" for a public use without compensation, a city is not liable for consequential damages caused by an authorized change in the grade of a public street, when private property is not actually encroached upon, although it may be injured in its use: *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *City of Kokomo v. Mahan*, 100 Ind. 242; *Smith v. City of Eau Claire*, 78 Wis. 457. In the case last cited, Lyon, J., in delivering the opinion of the court, said: "Perhaps no rule of law is more completely settled than is the rule that if consequential damages result to property owners from raising or lowering the grade of a street by a municipality, it is not a taking of private property for public use within the meaning of the constitution; and that if the municipality act under authority of law in making the change of grade, and with due care, it is not liable for such damages, unless made so by some statute or constitutional provision." So long as there is no application of a street to purposes other than those of a highway, and no diversion of it from street purposes, any changes of grade made lawfully and in good faith for the benefit of the public in using the street as a street, and not made maliciously, or for the purpose of doing injury to the abutter, are not within the constitutional prohibition against taking private property without compensation, nor the basis for an action for consequential damages. A trespass upon or physical invasion of property adjoining the street is necessary to bring municipal authorities, when grading streets, within such constitutional prohibition; and the original and all subsequent purchasers of property abutting on a street take with an implied understanding that the public shall have the right to improve or alter the street for street purposes, and that they can sustain no claim for damages resulting to their property for the impairment or destruction of their incidental rights of ingress and egress, or of light and air, as a mere consequence from the use or improvement of the street as a highway: *Selden v. City of Jacksonville*, 28 Fla. 558; 29 Am. St. Rep. 278, and note 298.

As an instance of such an invasion of private property as will entitle the adjoining lot-owner to damages for a taking under such constitutional provision may be given the well-considered case of *Vanderlip v. City of Grand Rapids*, 73 Mich. 522, 16 Am. St. Rep. 597, deciding that when a city, in grading a street, raises an embankment upon nearly thirty-five feet of the entire frontage of an abutting lot, thereby burying a portion of the dwelling-house and barn of the owner, this is as much a taking as to that part of the lot covered by the embankment as though the owner had been ejected by any other means, and is plainly within the inhibition of the constitution. The question under consideration is thoroughly discussed in the above case, and the note thereto, 16 Am. St. Rep. 610-614. To the same effect, under a somewhat similar state of facts, is the case of *Gray v. Mayor of Knoxville*, 85 Tenn. 99.

Constitutional Provisions against Damaging Property. — The constitutions of many of the states now contain a provision that private property shall not be taken or "damaged" for a public use without just compensation. The insertion of this word "damaged" has effected a material change in the law regarding the liability incurred by municipal corporations in grading or changing the grade of their streets under lawful authority conferred upon them by their act of incorporation, and it is this branch of the subject that will receive special consideration in this note. In the states where this special constitutional provision exists, the courts have been unanimous in holding that although prior to its enactment a municipal corporation was under no liability to an adjoining land-owner for any damages sustained by him from the action of the city in grading or changing the grade of its streets unless his property was actually invaded, yet under such constitutional provision a city is liable to him for all direct and consequential damage arising from its action in grading or changing the grade of its streets, unless he is compensated under the power of eminent domain before the work is done, or unless the injury sustained by him is shared by the public in general: *Reardon v. City of San Francisco*, 66 Cal. 492; 56 Am. Rep. 109; *Johnson v. City of Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779; *City of Atlanta v. Green*, 67 Ga. 386; *Blanchard v. City of Kansas*, 16 Fed. Rep. 444; 5 McCrary, 217; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *City of Pekin v. Brereton*, 67 Ill. 477; 16 Am. Rep. 629; *City of Bloomington v. Brokaw*, 77 Ill. 194; *City of Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412; *Schaller v. City of Omaha*, 23 Neb. 325; *Lowe v. City of Omaha*, 33 Neb. 587; *Werth v. City of Springfield*, 78 Mo. 107; *Householder v. City of Kansas*, 83 Mo. 488; *City Council of Montgomery v. Townsend*, 80 Ala. 489; 60 Am. Rep. 112; 84 Ala. 478; *Pusey v. City of Allegheny*, 98 Pa. St. 522; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659; *Sheehy v. Kansas City etc. R'y Co.*, 94 Mo. 574; 4 Am. St. Rep. 396. This rule has been sustained by the supreme court of the United States in the case of *Chicago v. Taylor*, 125 U. S. 161, where the court reached the conclusion that under a constitutional provision that private property shall not be taken or damaged for public use without just compensation, a recovery may be had in all cases where private property has sustained a substantial injury from grading or changing the grade of a street by a city, whether such damages are direct or consequential in their nature; and when property is damaged by establishing the grade of a street, or by lowering or raising the grade of a street previously established, it is damaged for the public use within the meaning of such a constitutional provision: *Werth v. City of Springfield*, 78 Mo. 107; *McElroy v. Kansas City*, 21 Fed. Rep. 257.

In *Reardon v. City of San Francisco*, 66 Cal. 492, 56 Am. Rep. 109, the court said: "But the contention is also put forth by the plaintiffs that the constitution comes to their relief, and that they are entitled to recover, by virtue of the provision of the organic law of the state, which prescribes as a paramount rule that 'private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner'; Cal. Const., art. 1, sec. 14. It is well known that the clause as to the protection of private property against an appropriation for public use was changed by the constitution adopted in 1879, and is no longer as it was under the former constitution: 'nor shall private property be taken for public use without just compensation'; Cal. Const. 1849, art. 1, sec. 8. The words above quoted show some of the changes — indeed, all of them — that require notice here. As the clause now stands, private property cannot be damaged for public use without just compensation having been first made or paid as prescribed. Are

the plaintiffs, then, entitled to recover of defendant under this constitutional guaranty against damage? This question is new in this court, this being the first cause coming before it since the adoption of the present constitution, requiring the decision of this question. To what kind of damage does the word 'damaged' refer? We think it refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. It embraces more than the taking. If it did not refer to more than the damage above mentioned, the word 'damaged,' in the clause relied on, would be superfluous. . . . We are of opinion that the right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage under this provision. This provision was intended to assure compensation to the owner, as well where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages are consequential, and for which damages he had no right of recovery at the common law. . . . We cannot think that the convention inserting in the constitution of this state the word 'damaged,' in the connection in which it is found, and the people in ratifying the work of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy, as well where one existed before as where it did not; to superadd to the guaranty found in the former constitution of this state, and in nearly all of the other states, a guaranty against damage where none previously existed. The provision includes damage to private property, including land, and whatever is attached to it. If land and buildings on it, or either, are damaged, this provision requires it to be compensated."

In the case of *Johnson v. City of Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779, the court said: "When the words 'or damaged' were incorporated into the constitution of West Virginia, in addition to the words 'private property shall not be taken,' the effect was as effectually to protect private property from being damaged for public use without just compensation as to prevent it from being taken for the same purpose without just compensation. The effect of this is to declare that a man's property rights shall not be invaded for public use unless he receives just compensation, and that his right of property shall not be invaded by a damage inflicted upon it, though the property is not taken, as well as that *corpus* of the property itself shall be protected from such invasion. . . . A municipal corporation makes a change in the grade of a principal street. One man owns a beautiful mansion on the summit of the hill. A change in the grade would be a great benefit to the whole city, and particularly to the owners of lots on said street, who have not yet built thereon; the council of the city determine to make the change; a cut up to the very line of the man's lot on the summit of the hill is made fifteen feet deep; everybody in the city except that man is benefited, but his property is ruined; he cannot use it as it is, and if it were practicable to lower his brick mansion, it would cost him more than it is worth. The common law says he is without remedy. His property was not 'taken' for a public use; but was it not "damaged" for public use? and is not the injury the same in character, if not in extent, as if it had been actually taken? Why should one man suffer all the loss for the benefit of the public? If the change was necessary for the public good, does not justice require that the public, for

whose good it was made, should pay for the damage occasioned by it? This rule puts all the citizens upon an equality; the common-law rule makes the one suffer for the many. It was to prevent this manifest injustice that this section was inserted in the constitution and adopted by the people. It is clear, then, that if a municipal corporation, in changing the grade by raising or depressing its streets, permanently damages the private property of an individual without acquiring the right to do so, and, if demanded, by paying just compensation therefor, it violates this provision of the constitution which declares that private property shall not be taken or damaged for a public use without just compensation." In the case of *City of Atlanta v. Green*, 67 Ga. 386, it was contended that such a provision in the state constitution was not intended to change the rule so well established and long recognized by the courts, that in improving its streets by raising or lowering the grade, a city would not be liable to lot-owners bounding thereon for consequential damages resulting therefrom, and the court said: "The duty devolves upon this court, then, to construe, for the first time, this clause in the bill of rights. In previous constitutions, the words varied from the present. 'Private property shall not be taken for public use without just compensation,' were the words ordinarily used. But, under the constitution of 1877, further protection is sought to be given to the property of the citizen; and now 'it shall not be taken or damaged' for public use without just compensation. The article does not define whether the damage shall be immediate and direct, or consequential. Any damage to property for public use must receive its compensation. It may be, and will no doubt often occur, that the consequential damage may impose a more serious loss upon the owner than a temporary spoliation or invasion of the property. We must presume the convention intended any damage, whether direct or consequential, done to property for public use must be compensated for. Now, this was private property, and the improvement of the street was being made for public use; and if the property was damaged thereby, why should not this plaintiff below be entitled to just compensation for such damages? We think, therefore, that the court did not err in instructing the jury that the former rule of law which once obtained was altered and changed by the clause in the bill of rights, heretofore cited, in the constitution of 1877." So in *Blanchard v. City of Kansas*, 16 Fed. Rep. 444, 5 McCrary, 217, Mr. Justice Miller said: "In the case before us, the property is injured; the damages were not ascertained, paid into court, nor paid to the party; no agreement was made with the party, but the city went on, as I understand the complaint, to do the work and inflict the damage, and has never taken any steps under any law, natural or divine, constitutional or unconstitutional, to make compensation. It results, then, that since the positive declaration of the constitution is, that private property shall not be taken or damaged for public use without just compensation, that it is bound in some way to make that just compensation, and that the law will compel it to do it."

In *City of Pekin v. Brereton*, 67 Ill. 477, 16 Am. Rep. 629, the court reached the conclusion "that although a city has power and authority to elevate or depress the grade of its streets as it may deem proper, yet if, in so doing, it inflicts an injury upon a lot-owner peculiar to him alone, it cannot be exempted from liability; and should it become necessary for the interests of the public, in the process of grading the streets, that the lot of an individual shall be rendered unfit for occupancy, wholly or in part, the public must pay for it to the extent to which it deprives the owner of its legitimate use." The above case was followed and approved in *City of Elgin v. Eaton*, 83 Ill. 535;

25 Am. Rep. 412; *City of Shawneetown v. Mason*, 82 Ill. 337; 25 Am. Rep. 321; *Rigney v. City of Chicago*, 102 Ill. 64.

What Constitutes "Damage." — To entitle a property owner to recover consequential damages for establishing or changing the grade of the street adjoining him, when there has been no actual invasion of his property, and he relies upon the constitutional provision that private property shall not be taken or damaged for a public use without compensation, he must show a special injury received, over and above that received by the public in general: *Rear- don v. City of San Francisco*, 66 Cal. 492; 56 Am. Rep. 109; *City of Pekin v. Brereton*, 67 Ill. 477; 16 Am. Rep. 629; *Rigney v. City of Chicago*, 102 Ill. 64; *City Council of Montgomery v. Townsend*, 80 Ala. 489; 60 Am. Rep. 112; 84 Ala. 478. The remedy provided by such constitutional provision has relation to injuries which, though popularly termed consequential, are yet to be understood as confined to such injuries to property as are actual, positive, and visible, the natural results and necessary ends of the original construction or enlargements of its street grades by the municipality, and of such certain character that compensation may be ascertained at the time the improvements are being made and paid for in advance, as provided in the constitution: *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659. In the case of *City Council of Montgomery v. Townsend*, 80 Ala. 489, 60 Am. Rep. 112, the court said: "The contestation arises on the construction of the clause of the constitution requiring municipal corporations to make just compensation for property taken, injured, or destroyed for public use. . . . This mandatory clause being a new provision, an extension for the protection of property, introduced into a revised constitution, should be liberally construed in favor of the citizen, and so as to secure the purposes intended, as ascertained from the considerations which produced its introduction. It operates a further limitation on the right of eminent domain, from which the state alone is excepted, and establishes a new rule, supported by better reason and founded in equal justice. The words 'injured and destroyed' were not used in vain and without meaning. It was intended that they should have effect; and unless they operate to impose a liability not previously existing, they are without operation. The new rule proclaimed by the constitution imposes a liability for private property injured or destroyed, though not taken, — a liability for consequential damages from which municipal corporations were theretofore exempt. This construction has been placed on a corresponding clause of the constitution of Pennsylvania by the supreme court of that state, of which ours is a copy: *Reading v. Althouse*, 93 Pa. St. 400. A material question is, In what cases and under what circumstances does the constitution impose the new and additional liability? In this connection our consideration has been cited to the decisions of the courts of several of the states as sustaining plaintiff's contention, that a municipal corporation is liable for the injury done to an abutting lot by any grading of an established street. By these decisions it is substantially held that the recent constitution made no difference as to the form of the public use, and that an abutter is entitled to recover the consequential damages caused to his property by raising or lowering the grade of a street: *City of Elgin v. Eiton*, 83 Ill. 535; 25 Am. Rep. 412; *Rear- don v. City of San Francisco*, 66 Cal. 492; 56 Am. Rep. 109; *Harmon v. Omaha*, 17 Neb. 548; 52 Am. Rep. 420; *Atlanta v. Green*, 67 Ga. 386; *Johnson v. Parkersburg*, 16 W. Va. 403; 37 Am. Rep. 779. . . . Having reference to the subject with which the constitution was dealing, there are three interpretations open, — to restrict the construction of a highway to its primary meaning, excluding subsequent alterations; or to extend it, and in-

clude all alterations without reference to the primary construction; or only to a class of changes which may be regarded as separate and distinct uses of the right of eminent domain as distinguished from the first taking or injury. We think that the last meets most fully the purpose of the constitution. . . . It is not the intent and operation of the constitution to infringe the existing rule as to the liability of the city for grading, altering, or improving the streets, further than is essential to the protection of private property and the equal distribution of the public burdens. Where land has been dedicated to the public for use as a street, the rule as to the liability of the municipality for subsequent alterations is the same, under the constitution, as if the land had been condemned under the right of eminent domain. In case of condemnation, the constitution does not operate to so restrain the power of municipal corporations over the streets as to subject them on each successive alteration and improvement to liability for damages, when the same could legally and should have been assessed on the first taking or injury of the property. A double liability is not intended, and unless all ascertainable damages are, or presumed to be, assessed at once, the corporation might be made liable to a double recovery for the same injury. This rule exempts from liability for damages arising from ordinary and reasonable changes and improvements which may be due to the natural formation of the surface, or to the increasing wants of the public, which injuries were capable of being foreseen and ascertained, could, and ought to have been, naturally anticipated, and are presumed to have been considered and included in the original assessment of compensation. Such changes or improvements are the natural and probable consequences of the uses and purposes for which the land was originally taken, and compensation then awarded; or in case of dedication, for which the owner received consideration in the resultant advantages: *Denver v. Bayer*, 7 Col. 113; 2 Am. & Eng. Corp. Cas. 465; *London etc. R'y Co. v. Evans*, 16 Beav. 322; *Lawrence v. Great Northern R'y Co.*, 16 Q. B. 643. But the right of the municipal authorities to change the grade of a street, or alter it in other respects, is not unlimited, nor to be exercised capriciously. It is bounded by the nature of the use for which the property was dedicated or condemned, and the necessities of a safe and convenient way, having reference to the wants of the community. To limit construction of its highways, as employed in the constitution, strictly to its primary signification would exclude cases which come within its spirit, and defeat the particular intent, that compensation shall be made for every injury to private property for public use in the form specified, — cases which came within the mischief and the constitutional remedy. The dividing line lies between what is necessary to safe and convenient use on the one hand, and what is in excess thereof, and not essential thereto, or mere ornamentalations, on the other. Under this rule, the constitution requires compensation to be made for the extraordinary changes which may not be due to the natural formation of the surface, nor to the mode of original construction as then deemed sufficient to a safe and convenient way. A material change, operating injury to adjoining premises, occasioned by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury in the enlarged sense of the constitution, which casts on the property owner an additional burden, entitling him to compensation. Injuries by the construction of a highway, as provided for in the constitution, include those injuries produced by alterations which could not

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clude all alterations without reference to the primary construction; or only to a class of changes which may be regarded as separate and distinct uses of the right of eminent domain as distinguished from the first taking or injury. We think that the last meets most fully the purpose of the constitution. . . . It is not the intent and operation of the constitution to infringe the existing rule as to the liability of the city for grading, altering, or improving the streets, further than is essential to the protection of private property and the equal distribution of the public burdens. Where land has been dedicated to the public for use as a street, the rule as to the liability of the municipality for subsequent alterations is the same, under the constitution, as if the land had been condemned under the right of eminent domain. In case of condemnation, the constitution does not operate to so restrain the power of municipal corporations over the streets as to subject them on each successive alteration and improvement to liability for damages, when the same could legally and should have been assessed on the first taking or injury of the property. A double liability is not intended, and unless all ascertainable damages are, or presumed to be, assessed at once, the corporation might be made liable to a double recovery for the same injury. This rule exempts from liability for damages arising from ordinary and reasonable changes and improvements which may be due to the natural formation of the surface, or to the increasing wants of the public, which injuries were capable of being foreseen and ascertained, could, and ought to have been, naturally anticipated, and are presumed to have been considered and included in the original assessment of compensation. Such changes or improvements are the natural and probable consequences of the uses and purposes for which the land was originally taken, and compensation then awarded; or in case of dedication, for which the owner received consideration in the resultant advantages: *Denver v. Bayer*, 7 Col. 113; 2 Am. & Eng. Corp. Cas. 465; *London etc. R'y Co. v. Evans*, 16 Beav. 322; *Lawrence v. Great Northern R'y Co.*, 16 Q. B. 643. But the right of the municipal authorities to change the grade of a street, or alter it in other respects, is not unlimited, nor to be exercised capriciously. It is bounded by the nature of the use for which the property was dedicated or condemned, and the necessities of a safe and convenient way, having reference to the wants of the community. To limit construction of its highways, as employed in the constitution, strictly to its primary signification would exclude cases which come within its spirit, and defeat the particular intent, that compensation shall be made for every injury to private property for public use in the form specified, — cases which came within the mischief and the constitutional remedy. The dividing line lies between what is necessary to safe and convenient use on the one hand, and what is in excess thereof, and not essential thereto, or mere ornamentations, on the other. Under this rule, the constitution requires compensation to be made for the extraordinary changes which may not be due to the natural formation of the surface, nor to the mode of original construction as then deemed sufficient to a safe and convenient way. A material change, operating injury to adjoining premises, occasioned by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury in the enlarged sense of the constitution, which casts on the property owner an additional burden, entitling him to compensation. Injuries by the construction of a highway, as provided for in the constitution, include those injuries produced by alterations which could not

have been naturally and reasonably anticipated, and damages for which could not have been legally awarded in the preliminary assessment if the land is condemned, or if dedicated, which the owner would not be estopped to claim. This construction effectuates the cardinal purposes of the constitution, — the protection of private property, and the equal distribution of the public burdens, — avoids double compensation, and is applicable alike to all corporations, municipal and other, and individuals invested with the privilege of taking private property for public use. We are aware that we have left a wide margin for diversified opinion; but we cannot lay down a more definite general rule, applicable to all cases, where each case is dependent on its special facts and circumstances, — as definite, however, as the rule which defines the prospective injuries for which compensation may be recovered on condemnation of the land for public use. It applies when the municipal corporation is not the owner of the fee. If such owner, other rules may govern."

In the subsequent case of *City Council of Montgomery v. Townsend*, 84 Ala. 478, the court adhered to the rule that, under such clause in the constitution, a liability is imposed for injuries caused to adjacent property by a change in the grade or surface of the street, when it goes beyond the extent and purpose of the original taking or dedication, and when made for ornamentation, or to improve the general appearance of the street, or for an increase of convenience beyond the ordinary standard.

A city has no right to obstruct or to authorize the obstruction of its streets so as to deprive property owners of free access to and from their adjacent lots; and if it permits or authorizes the use of a street for an approach to a bridge, it must see that the approach is so constructed as not to produce injury to the adjoining owner. A failure of this duty makes the city liable to respond for consequential damages: *Stack v. City of East St. Louis*, 85 Ill. 377; 28 Am. Rep. 619. In delivering the opinion in the case of *City of Denver v. Bayer*, 7 Col. 113, Mr. Justice Helm said: "No good reason is observed for discriminating against the easement in a street connected with the lot of an adjoining owner. We are disposed to say that it is property within the meaning of our constitution; and any interference therewith which results in injury to the realty must, with the exceptions hereinafter stated, be justly compensated. If, in such a case, there be no technical 'taking' of private property, there is a damaging thereof within the constitutional inhibition. Whatever permanently prevents the adjacent owner's free use of the streets for ingress or egress to or from his lot, and whatever interference with the street permanently diminishes the value of his premises, is as much a damage to his private property as though some direct physical injury were inflicted thereon. But sometimes these interferences and resulting injury may properly, even in this state, be held to be *damnum absque injuria*. as where they are occasioned by a reasonable improvement of the street by the proper authorities for the greater convenience of the public, or where a mere temporary inconvenience or injury results from a legitimate use thereof by the public. It is the duty of the city council to protect and improve the street in such manner as will render it most useful for a highway. In determining what changes and improvements are most conducive to this end, the council exercises a large discretion; and unless unreasonable changes are made, or injury results to the adjoining premises through the unskillfulness or negligence of those employed, the owner thereof will not be heard to complain, though in fact the real value and convenience of his property are diminished thereby; for in purchasing his lot, or in relinquishing the public easement,

he is conclusively presumed to have contemplated this power and authority of the municipal government, and is held to have anticipated any injury to his abutting lot or land resulting from a reasonable and proper exercise thereof. It must be borne in mind that these presumptions attach only so long as the purpose of the change is to render the street more convenient and useful as a highway. When this object is abandoned, and the council direct or permit a change or use wholly foreign to the ordinary purposes of a highway, and where, thereby, adjacent lands or property is actually damaged, the owner thereof is, in this state, entitled to a reasonable compensation for the injury. The following cases were decided under constitutional inhibitions similar to ours in this respect, and they assume, without discussion, that the words 'or damaged,' thus used, are the recognition, by their respective constitutions, of a new right of recovery. They do not limit such right to cases where an action would, without the constitutional provision, have lain at common law: *Johnson v. Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779; *City of Atlanta v. Green*, 67 Ga. 386; *City of Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412. These cases were against the cities for damages caused in grading the streets by their respective councils. The right to recover compensation was sustained in all. As will be observed, we do not go so far as some of these cases. That our position might not be misunderstood, we have, at the risk of being charged with *obiter dictum*, suggested that, as at present advised, we think that for injuries caused by a reasonable change or improvement of the street by the council in a careful manner, the abutting owner should not recover." This case was subsequently approved and followed in *City of Denver v. Vernia*, 8 Col. 402.

In *Rigney v. City of Chicago*, 102 Ill. 64-83, the court said: "While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement." And Chief Justice Dickey, in delivering a concurring opinion in that case, expressed his view as follows: "It is not every change of grade made in a street which may, in effect, impair the value of the lot in its vicinity which is a violation of the right of the proprietor thereof. Such changes in a street as it may reasonably be supposed might be made for the improvement of the public highway the purchaser of a lot upon a street must be assumed to have assented to when the purchase was made. The making of such changes is therefore no invasion of his right in that regard." The three cases last cited denied the right of the lot-owner to compensation, on the ground that the change of grade involved was but a proper improvement for the benefit of the street and of the public.

The majority of the cases seem to sustain the broad proposition that property is damaged for a public use within the meaning of the constitutional provision when the abutting owner is damaged by the grade of the street being established, or by a previously established grade being raised or lowered. Among the cases which sustain the rule that, under such a constitutional provision as we are considering, the adjoining lot-owner is entitled to recover any consequential damage his property may suffer from the change of grade in the street of a city, unless he has previously been tendered compensation, no matter whether the work is carefully done, and for the best interests of the city and the public, or otherwise, may be cited *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Johnson v. Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779; *Worth v. Springfield*, 78 Mo. 107; *Sheehy v. Kansas City etc. R'y Co.*, 94 Mo.

574; 4 Am. St. Rep. 396; *City of Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412; *City of Atlanta v. Green*, 67 Ga. 386.

In the case of *Hutchinson v. City of Parkersburg*, 25 W. Va. 226, the court determined that when the owner of land near a city builds a dwelling-house thereon, and otherwise improves it, and the limits of the city are afterwards extended so as to open a new street or extend an old one along the boundaries of the lot, the city is liable in damages for any permanent injury inflicted upon the lot or dwelling-house, and caused by grading or improving the street, unless the city has first acquired the right to grade the street by condemnation proceedings, and has paid the lot-owner his just compensation. The facts in this case were, that the owner of land on a highway outside the limits of a city had built a dwelling-house thereon, and otherwise improved it. Afterwards, the limits of the city were extended so as to include this land, and the city, which had succeeded to all the rights of the state in the highway, then commenced to grade it and turn it into a street proper, without acquiring any right to do so, and without making any compensation. The highway had originally been graded, and the city, in regrading it as a street, filled it in its entire width to an additional height of eighteen feet, thus rendering access to and from the lot almost impossible; and the court reached the conclusion that this was such a permanent injury to the land and dwelling-house as entitled the owner to maintain an action on the case for damages against the city, under a clause in the constitution declaring that private property shall not be taken or damaged for a public use without compensation.

The fact that the owner of the land adjoining the street has no title to the land in the street does not affect his right to recover damages from the city for any injury inflicted upon him by a change in the grade of the street: *Hobson v. Philadelphia*, 150 Pa. St. 595; *Wheeling v. City of Parkersburg*, 25 W. Va. 226; *Denver v. Bayer*, 7 Col. 113.

When the adjoining owner erects a dwelling-house on his lot after the adoption of the plan fixing the grade of the street, he is restricted in his right to recover to injury done to his land alone by the grading. The injury to his house must be excluded as an item of damage: *Groff v. Philadelphia*, 150 Pa. St. 594. But a city is liable, under such a constitution, for such damages as the lot-owner may sustain to his buildings by the filling in of the street in front of his lot above the level of the buildings, when they were erected on the lot before any grade was established: *Harmon v. Omaha*, 17 Neb. 548; 52 Am. Rep. 420; *Hammond v. City of Harvard*, 31 Neb. 635.

Damages for Establishing Grade. — When the property of an abutting owner is damaged by the establishment of the grade of a street, for the first time changing it from the natural grade, such property is "damaged" within the meaning of the constitution, as much as it is by raising or lowering the grade of the street as previously established: *Werth v. City of Springfield*, 78 Mo. 107; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Hutchinson v. City of Parkersburg*, 25 W. Va. 226; *Sheehy v. Kansas City etc. R'y Co.*, 94 Mo. 574; 4 Am. St. Rep. 396; *Hendrick's Appeal*, 103 Pa. St. 358; *Borough of New Brighton v. United Presb. Church*, 96 Pa. St. 331. In the latter case it is expressly ruled that a change from the natural grade in a street is a change of grade just as clearly as if changed from a grade previously made by the authorities. In the case of *Borough of New Brighton v. Peirsol*, 107 Pa. St. 280, it appeared that some work had been done toward changing the natural grade of the street before the complainant had purchased the adjoining land; but it did not appear that any specific grade had been fixed, by ordinance or other-

wise, and the court ruled that what had thus been done created no legal presumption that any further change of grade would be made, and as the former owner could not recover for the damage from the change of grade since the complainant purchased, and sustained by work done since the adoption of the constitutional provision giving him a right to recover for any damage inflicted on his property without compensation, the complainant was consequently entitled to recover for such damage against the city making the change in the grade of the street. And it was determined in *Bloomington v. Pallock*, 38 Ill. App. 133, that the fact that the grade was fixed by an ordinance passed prior to the purchase of the property, and to the adoption of such constitutional provision, was no defense in an action by an adjoining property owner to recover damages caused by a change of grade in the street abutting his property.

Measure of Damages. — When city property is damaged by reason of the grading of a street upon which it abuts so as to entitle the property owner to recover under the constitutional guaranty that private property shall not be damaged without compensation, the measure of recovery in consequential damages is the difference in the market value of the property with the improvement, and that without it, not considering general benefits or injuries shared by the public in general: *City of Denver v. Bayer*, 7 Col. 113; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415; *Chambers v. South Chester*, 140 Pa. St. 510; *Lowe v. Omaha*, 33 Neb. 587; *City of Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412; *Springer v. City of Chicago*, 135 Ill. 553; *Chouteau v. St. Louis*, 8 Mo. App. 48; *Omaha v. Kramer*, 25 Neb. 489; 13 Am. Rep. 504. The rule is stated in *Parker v. Atchison*, 46 Kan. 14, to be, that where a city changes the grade of one of its streets, an abutting lot-owner will be entitled to any special damage he may suffer thereby; and in a suit to recover, the jury may take into consideration the condition of the property, the street, and the grade, and also the market value of the property immediately before and after the grading; and when the property is injured in value, the measure of damage will be the difference in the market value brought about by reason of the change of the grade; and when the property is not injured in value by reason of such change, no damages can be recovered. The damage must be measured by the pecuniary loss; and if the property is benefited as much as damaged by the change of grade in the abutting street, there can be no recovery: *City of Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412; *Springer v. Chicago*, 135 Ill. 552. In *Moore v. City of Atlanta*, 70 Ga. 611, 614, the court said that "if any owner of property be damaged by the grading of a street, so as to lessen the pecuniary value of his property, he may recover damages for such injury to his freehold. That damage will be measured by the decrease in the actual value of his property. If the value pecuniarily be not decreased, he can recover nothing. If it would have been decreased in value as a mere residence, without regard to the improvement of access made by the grade of the street, and yet this improvement and the increased value thereby produced equaled the inconvenience or discomfort of the house as a mere residence, then the one could be set off against the other, and no recovery could be had. In other words, the right of recovery would turn in each case on the diminution in the pecuniary or market value of the property caused by the grade." This is the doctrine pronounced by the following cases: *City of Atlanta v. Green*, 67 Ga. 386; *Springer v. City of Chicago*, 135 Ill. 553; *Lowe v. Omaha*, 33 Neb. 587; *Schaller v. Omaha*, 23 Neb. 325; *Denver v. Bayer*, 7 Col. 113; *City of Shawneetown v. Mason*, 82 Ill. 337; 25 Am. Rep. 321; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415,—all holding that

In such a case the effect on the market value of the whole property should be considered, and not merely such effect on part of it. If one part of the property is specially benefited, and the value of the whole is not diminished, then there is no damage done, and no recovery can be had. Any general benefit common to all other property should not be considered in determining whether the property is benefited as much as injured or not. While the measure of damages is the difference in the market value of the abutting property before and after the grading is done, yet neither the falling of a brick wall nor the apprehended undermining of a dwelling-house situated thereon can be considered in estimating the damages: *City Council of Montgomery v. Townsend*, 80 Ala. 489; 60 Am. Rep. 112; and only the injury resulting directly from the improvement itself, and not subsequent injuries or annoyances, can be considered in estimating the damages: *City Council of Montgomery v. Townsend*, 84 Ala. 479. The whole subject of the measure of damages in such cases is excellently stated in *Lehigh Valley Coal Co. v. Chicago*, in the United States circuit court for the northern district of Illinois, and reported in 26 Fed. Rep. 415, where Mr. Justice Dyer, in instructing the jury in that case, said: "In considering the case, the true question is, whether the property was injured by the improvement. If not, then there is no damage, and can be no recovery. If there is, then the recovery must be measured by the extent of the loss. If the property is worth as much after the improvement as it was before, then there is no damage done to the property. If the benefits received from making the improvement are equal to or greater than the loss, then the property is not damaged. There can be no damage to property without a pecuniary loss. If there is no depreciation in value, there is no damage; and if no injury, then there should be no recovery. This is the language of the supreme court of this state on the subject, and established the general rule by which we should be guided in disposing of this case. The test is, that the alleged injury must rest upon some substantial cause actually impairing the value of the property or its usefulness, and not to be the result of taste or fancy, merely because of the proximity of the improvement to the property claimed to be affected. Whether the plaintiff's property was damaged depends upon whether it received such material injury as rendered it less valuable to the owners, or less useful as a whole, than it would have been but for the viaduct having been constructed as it is. It is not the damages to a part of the property, considered separately from the rest, that you are allowed to assess, but the damages, if any, to the property as an entirety, by reason of the construction of the viaduct, that are to be taken into consideration. It is inadmissible to treat any portion of the property injured as a distinct and separate parcel from any portion benefited. A partial effect only is not to be considered, but the whole effect; and the effect, not upon any selected part of the property, but upon the whole property. It is, of course, admissible to consider the injury, if any, to a part as affecting the whole, or as showing a damage to the whole; but what I mean is, that if a part of the property be benefited or not injured, and a part be injured, you have no right to award damages for injury to the part as disconnected from the remainder, or the part benefited or not injured. Following up the application of this principle, if injury only resulted from the viaduct to a certain part of the premises, and if that injury was outweighed by additional benefits to the residue, which enhanced the market value of the property, then it could not be considered that the premises, as a whole, were damaged by the construction of the viaduct. In determining the damages, if any have been sustained, and if you come to that question, the inquiry should be

confined to the effect of the construction of the viaduct upon the market value of the property, and the purposes for which it was used and designed. Its location and advantages, or disadvantages, as to the situation are proper matters of consideration by the jury. The question is, Was its market value depreciated by construction of the viaduct? And so the past profits of the business there carried on, and conjectural profits for the future, should not enter into your consideration, because too speculative and uncertain, and therefore not a proper basis upon which to ascertain the market value of the property. Of course, many elements of fact may be taken into account as bearing upon the market value, such as the situation of the property, the uses to which it is put, the character and extent of the business carried on, the facilities for doing the business, and the location of the property as a point commanding trade from various parts of the city, or otherwise. These may all be considered, but with sole reference to market value. In other words, take this property as it was immediately before the viaduct was constructed, with all its surroundings, what was its fair and reasonable market value at that time? Then take it as it was after the viaduct was built, considering everything in relation to its surroundings and situation, and what was its fair market value then? Was the value it had before the viaduct was constructed depreciated by the construction of this work? or were there resulting benefits equaling or exceeding the alleged injury? As I have indicated, particular injury to the business, as such, is not to enter into the measure of damages; nor is the cost of constructing the new or extended roadway into the yard, and of raising the office and scales, as a mere item of expense which the plaintiffs may have had to pay, to be allowed them; but the fact that changes have had to be made, the extent and the effect of those changes, the fact, if it be a fact, that the alleged changes have entailed, and may yet entail, expense upon the plaintiffs, may be taken into consideration by you, in connection with the entire situation of the property, its accessibility and usefulness, with all the facts of the case, to the extent that they bear upon the question of market value. What was the situation of the property before the viaduct was built? How was it situated with reference to Chicago Avenue, and to the railroad crossing at the junction of Halsted Street and Chicago Avenue? What was its accessibility? What were its advantages and disadvantages as a piece of business property, taking the whole situation into account, just as it stood before the viaduct was constructed? And then, taking into consideration the same elements of fact, how was the property affected by the building of the viaduct, measuring such effect by a pecuniary standard based upon market value? You have been permitted to view the premises in question and the viaduct, and you have the right to take into account such facts as you learned by viewing the property as to whether the construction of the viaduct permanently depreciated or increased the market value of the property, or as to whether the alleged benefits equaled the alleged injury. You have the right, in other words, in arriving at a verdict, to use and act upon the knowledge you may have acquired by inspection of the premises."

Market Value of Property Damaged by grading or changing the grade of a street is, not what the property is worth solely for the purpose to which it is devoted at the time of the injury, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available: *Loone v. Omaha*, 33 Neb. 587; *Denver v. Bayer*, 7 Col. 113; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415.

Remedial Statute not Necessary to Recovery. — When the state constitution

forbids a damage to the private property of an individual, unless he is compensated, and no statute gives a remedy for the invasion of his right of property thus secured, the constitutional prohibition is self-executing, and the common law will furnish an appropriate form of action on the case as an adequate and appropriate means of redress for a property owner whose premises have been damaged by grading or changing the grade of a street in a city: *Householder v. City of Kansas*, 83 Mo. 488; *Johnson v. City of Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779. In *McElroy v. Kansas City*, 21 Fed. Rep. 257-259, the court said: "This constitution was adopted in 1875; there have been many sessions of the legislature since; no action has been taken. There is no power to compel action by the legislature; it may leave the matter unattended to, indefinitely, in the future; and the question is, Can the imperative mandates of the constitution be practically defeated by the want of action on the part of the legislature? I am not insensible of the importance of this question, or of the consequences which may hinge upon its decision; but I think that the duty of the court is plain. The constitution is the final law, measuring all private and public rights, whose commands legislatures and courts must respect; whose mandates, when imperative, must be enforced, regardless of all consequences. As the established rule of construction has been, under constitutions prohibiting the taking of private property for public use until compensation was first made, to enforce that mandate irrespective of all legislative action, the same rule must obtain in this case. The damage to property is placed upon the same basis as the value of the property taken, and neither can be done without compensation first made. In other words, uniting 'property taken' with 'property damaged,' in the same clause and subject to the same prohibitions, places them in the same category as to judicial action. I see no logical escape from this conclusion. When the constitutional convention met, the rule of protection against the taking of private property had long been settled, and must have been familiar. It did not attempt to prescribe two rules. It did not even make two enactments, but simply added 'property damaged' to 'property taken'; and for the courts to now hold that, under the same language two rules were prescribed is to create a distinction which has no just foundation, and would be mere judicial legislation. I know that there are many provisions of the constitution which are not self-executing, which are, so to speak, dormant until the legislature acts, as where rights are given, to be exercised in a way provided by the legislature. I think, too, in these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions, intended to protect every man in the possession of his own. I hold, therefore, that the rule of the constitution is the same in respect to property damaged as to property taken, and that such constitutional guaranty needs no legislative support, and is beyond legislative destruction."

Damages under Statutes. — In the absence of a constitutional provision that private property shall not be damaged for public use without compensation, a city property owner, who is injured by a change in the grade of a street, is without remedy for consequential damages, unless this remedy is given by statute. In many of the states such statutes exist, applying chiefly, if not solely, however, to a change in the established grade of the street, but not to the damage done by the original establishment of the grade. When the

right to compensation for a change of grade is given by statute, the adjoining property owner is entitled to damages, if injured by the change, whether the work is negligently done or not; but, to entitle him to recover, he must show some substantial injury peculiar to himself alone, and not suffered by the public in general. Street grades are changed under a sovereign right closely akin to the right of eminent domain; and it is in accordance with established practice to apply to cases covered by a statutory remedy the same rules which govern in analogous cases under the constitutional provision treated above, that private property shall not be "damaged," etc. Hence, when the statute requires the municipality to pay or tender the damages caused by a change of grade, it has no right to proceed until this is done; and if it does, an action will lie for the consequential damages suffered by the adjoining land-owner. The authority delegated is to proceed with the work in accordance with law, and if the municipal authorities attempt to proceed in any other mode, they act, in legal contemplation, without authority, and subject the city to an action as a wrong-doer who has invaded private rights: *City of Logansport v. Pollard*, 50 Ind. 151; *City of Kokomo v. Mahan*, 100 Ind. 242; *Mattingly v. City of Plymouth*, 100 Ind. 545; *City of Lafayette v. Wortman*, 107 Ind. 404-408; *City of Lafayette v. Nagle*, 113 Ind. 425; *Dakell v. Davenport*, 12 Iowa, 437; *Hempstead v. Des Moines*, 52 Iowa, 303; *Noyes v. Mason City*, 53 Iowa, 418; *Kepple v. Keokuk*, 61 Iowa, 653; *Phillips v. Council Bluffs*, 63 Iowa, 576; *Snow v. Inhabitants of Provincetown*, 109 Mass. 123; *Lane v. Boston*, 125 Mass. 519; *City of Cambridge v. County Comm'rs of Middlesex*, 125 Mass. 529; *McCarthy v. St. Paul*, 22 Minn. 527; *Aldrich v. Board of Aldermen of Providence*, 12 R. I. 241; *Heiser v. Mayor etc. of New York*, 104 N. Y. 68; *Mayor etc. of Nashville v. Nichol*, 3 Baxt. 338; *Healey v. New Haven*, 49 Conn. 394; *Pearson v. Zable*, 78 Ky. 170. In *O'Brien v. St. Paul*, 25 Minn. 331-334, 33 Am. Rep. 470, the court reached the conclusion that in the control and improvement of its streets by grading, a city has the same rights and powers as a private owner has over his own land, subject to the same liabilities. The corporation will be liable for damages caused to private property by grading streets, when a private owner of the soil over which the streets are laid would be liable, if improving it for his own use. The right to cause damage beyond that which a private owner may cause without liability must be acquired through the right of eminent domain. This case was followed and approved in *Dyer v. St. Paul*, 27 Minn. 457; *Armstrong v. St. Paul*, 30 Minn. 299. As before said, an abutting owner is entitled to compensation for injury to his property caused by a change of grade in the street, but he is not entitled to damages for the establishment or working of a grade, where none previously existed: *Aldrich v. Board of Aldermen of Providence*, 12 R. I. 241; *Kepple v. Keokuk*, 61 Iowa, 653.

Elements of Damage. — Under a statute authorizing a recovery of the damages sustained by a change in the grade of a street, the damages recoverable by the owner of an adjoining lot include all necessary expenses in changing the grade of the lot to conform it properly to the new grade of the street, and also the expense of repaving the street charged upon the lot, and rendered necessary by the change in the street grade; and it makes no difference that the lot is not improved, and that the expense of conforming its natural grade to the grade of the street as finally established has been no greater than it would have been if such final grade has been adopted in the first instance: *French v. Milwaukee*, 49 Wis. 584; *McCarthy v. St. Paul*, 22 Minn. 527; *Van Riper v. Essex Public Road Board*, 38 N. J. L. 23. But it is only when a change in the grade of the abutting property, by cutting or

filling, is rendered necessary by the change in the grade of the street, that such cutting and filling become legitimate items of damages against the city: *Tyson v. Milwaukee*, 50 Wis. 78. This rule is denied in Pennsylvania, and the cost of filling the lot and raising buildings to the level of the new grade cannot be allowed as part of the damages recoverable: *Chambers v. South Chester Borough*, 140 Pa. St. 510. It is not necessary that the lot-owner should have made improvements with reference to a grade as established, to entitle him to recover damages resulting from a change of grade. The fact that improvements have been so made, however, may augment the damages: *City of Lafayette v. Nagle*, 113 Ind. 426. The damages should not be limited to the injury sustained by the improvements alone, but they should also include the injury to the land: *Dabell v. Davenport*, 12 Iowa, 437; *Stirkford v. St. Louis*, 7 Mo. App. 217; affirmed 75 Mo. 309; *Hempstead v. Des Moines*, 52 Iowa, 303.

Measure of Damages. — When a city changes the grade of one of its streets, an abutting land-owner is entitled, under such statutes, to any damage he may suffer thereby, affecting the market value of his property before and after the grading; and when his property is thereby injured in its market value, the measure of damages will be the difference in such value brought about by reason of the change of grade: *Parker v. Atchison*, 46 Kan. 14; *McCarthy v. St. Paul*, 22 Minn. 527; *Chambers v. South Chester Borough*, 140 Pa. St. 510. The measure of damages is the diminution in value of the entire realty, and is not limited to the injury to improvements alone: *Hempstead v. Des Moines*, 52 Iowa, 303. If the property is not injured in value by reason of the change in the grade, no damages can be recovered: *Parker v. Atchison*, 46 Kan. 14. And the damages may be mitigated by reason of benefits common to all property owners by the improvement: *Mayor etc. of Chattanooga*, 13 Lea, 611.

Miscellaneous. — A liberal construction should be given to statutes in favor of the right of the citizen to recover damage to his property, caused by a change in the grade of a street under city authority: *Mayor etc. of Nashville v. Nichol*, 3 Baxt. 338; but the remedy provided by such statute is exclusive, and must be strictly pursued in the manner pointed out, and no right of action exists, except that directed in the statute: *Heiser v. Mayor etc. of New York*, 104 N. Y. 68; *Anness v. Providence*, 13 R. I. 17; *Imler v. Springfield*, 30 Mo. App. 669-676. The cause of action accrues against the city whenever and as soon as the alteration in the grade of the street becomes legally and finally determined and fixed: *McCarthy v. St. Paul*, 22 Minn. 527. The land-owner cannot split his cause of action, but must recover all damages, past and prospective, in one action and at one time: *City of Lafayette v. Nagle*, 113 Ind. 426; *Keil v. St. Paul*, 47 Minn. 288.

A statute cannot act retroactively, so as to authorize the recovery of damages for injuries sustained by a change in the grade of a street, prior to the adoption by the state of a constitutional provision, that private property shall not be damaged or injured for public use without compensation: *Folkerson v. Borough of Easton*, 116 Pa. St. 523.

FIRMSTONE v. SPAETER.

[150 PENNSYLVANIA STATE, 616.]

BOUNDARIES — HIGHWAY OR STREET AS. — When an agreement for the purchase of land, at a certain price per acre, after a survey is made, calls for a street or highway as one of the boundaries, the purchaser is bound to pay for the land to the middle line of such street or highway, unless a contrary intention plainly appears.

Bernard Gilpin and Anthony Swain, for the appellants.

Charles Davis and Matthew Dittmann, for the appellee.

McCOLLUM, J. This is an action to recover the price of a tract of land sold by the acre. In the agreement of sale the land is described as "situate in the borough of Jenkintown, bounded by the lands of R. J. Dobbins, Isaac Mather, and Edward Stotesbury, and Walnut Lane and Greenwood Avenue, containing forty-one acres more or less," and it is provided therein that the same shall be surveyed. The only dispute between the parties relates to the location of the boundary line along Walnut Lane and Greenwood Avenue. These are public streets, and the appellant contends that the line is in the center, while the appellee insists that it is on the side of them. The liability of the latter to pay the former at the rate stipulated for the acreage included within the true boundary lines is not denied, nor can it successfully be, in view of the unambiguous terms of their contract. Where, then, is the boundary line of the tract along the streets mentioned? In 2 Am. & Eng. Ency. of Law, 507, the rule on this subject is stated thus: "Where land is bounded by a highway or street, the location of the boundary line will, in the first place, depend upon the character of the public right to the road or street. If the state or municipality owns the bed of the road, the boundary line of the abutting land is the nearer edge of the roadway; but if the public only have a right of way over the land, not a title to the soil, then the location of the boundary line depends upon the intention of the grantor, as manifested by the language of the deed, and the same rules of construction apply as are found in practical use in the case of non-navigable streams. If the land is described as 'bounded on,' 'running along,' the highway, and the like, the boundary line is the center of the highway, although the dimensions of the lot would exclude the highway; and in all cases of doubt, the presumption is always in favor of the boundary being in the

center of the road." This is the rule laid down in 2 Washburn on Real Property, 680, and in numerous decisions of this court, among which we may mention *Paul v. Carver*, 26 Pa. St. 223; 67 Am. Dec. 413; *Cox v. Freedley*, 33 Pa. St. 124; 75 Am. Dec. 584; and *Falls v. Reis*, 74 Pa. St. 439. In the case last cited, Agnew, J., delivering the opinion of the court, said that "where a street is called for as a boundary, the middle line of the street is always intended, unless the contrary plainly appears." Applying this rule to the present case, it is clear that where the tract is bounded by the streets, the line is in the center of them, and it is equally clear that the survey called for by the agreement must be in conformity with it. It is the true boundary line, and it cannot be changed without the mutual consent of the parties. The vendor must make a deed, and the vendee must pay in accordance with it. There is no room in their contract, nor just foundation in the surrounding circumstances, for an inference that the parties intended, in calculating the acreage to be paid for, to exclude any portion of the land lying within the boundaries they established. These, as we have seen, include a portion of Walnut Lane and Greenwood Avenue, over which the public have a right of way. It is probable that in fixing the price per acre, the boundaries of the property, the effect of the street upon it, and all matters which increased or diminished its value were considered and allowed their proper influence. They sustain the same relation to the purchase of a tract of land by the acre as to a purchase of it for a gross sum. In either case they are elements which enter into and affect the price to be paid for it. A sale, by the acre, of a tract of land having one of its boundaries in the center of a public street is not unusual, nor is there anything in it to reasonably lead to a belief that injustice will be done by the enforcement of the contract according to its terms. In such case the acreage must be ascertained by a survey in accordance with the boundaries called for, and the fair and just conclusion is, that in fixing the price per acre, the public easement and other matters affecting the value of the property received such consideration as they were entitled to. It follows from these views that the learned court below erred in refusing judgment for the amount of the appellants' claim.

The judgment is reversed, and it is ordered that the record be remitted to the court below, with direction to enter judgment against the defendant for such sum as to right and jus-

tice may belong, unless other legal or equitable cause be shown why such judgment should not be entered.

BOUNDARIES — HIGHWAYS OR STREETS AS. — When the owner of a piece of land conveys a portion of it by a deed which bounds the land conveyed by a street, the presumption is, that the conveyance carries the fee to the center of the street: *Matter of Ladue*, 118 N. Y. 213; *Warbritton v. Demorett*, 129 Ind. 346; *Florida etc. R'y Co. v. Brown*, 23 Fla. 104; *Silvey v. McCool*, 86 Ga. 1; *Thomsen v. McCormick*, 136 Ill. 135; *Low v. Tibbetts*, 72 Me. 92; 39 Am. Rep. 303, and extended note; *Kneeland v. Van Valkenburgh*, 46 Wis. 434; 32 Am. Rep. 719, and note; *Salter v. Jonas*, 39 N. J. L. 469; 23 Am. Rep. 229, and note; *Weisbrod v. Chicago etc. R'y Co.*, 18 Wis. 35; 86 Am. Dec. 743, and note; *Hinchman v. Paterson etc. R. R. Co.*, 17 N. J. Eq. 75; 56 Am. Dec. 252, and note; *Ooa v. Freedley*, 33 Pa. St. 124; 75 Am. Dec. 584, and note with cases collected; *Witter v. Harvey*, 1 McCord, 67; 10 Am. Dec. 650. The grant of land bounded by a highway carries the fee to the center of the way, if the title of the grantor extends so far: *Palmer v. Dougherty*, 33 Me. 502; 54 Am. Dec. 636, and note. Where the original owner of land platted it into streets and lots, and laid out a street on the margin, wholly on his own land, and next to unplatted lands of a stranger, a conveyance of lots bounded on such street carries the fee to the whole street: *Matter of Robbins*, 34 Minn. 99; 57 Am. Rep. 40. The fee in a street passes by a conveyance of lots bounded thereon, so far as it fronts the lots: *Livingston v. Mayor*, 8 Wend. 85; 22 Am. Dec. 622, and note. Where the grantor owns the fee of the soil of the whole highway, the presumption is, that a conveyance of his land bounded thereby will carry the fee to the whole highway: *Haberman v. Baker*, 128 N. Y. 253. But a deed of a lot bounded by stones "on the side of the road," and answering the call for quantity without the road, does not convey to the centre of the road: *Peabody Heights Co. v. Sadtler*, 63 Md. 533; 52 Am. Rep. 519, and note. A grantor's title will not be limited to the edge of a public street, unless there is an express exception in the deed to that effect, or some clear declaration or certain and immemorial usage: *Paul v. Carver*, 26 Pa. St. 223; 67 Am. Dec. 413, and note. A deed does not carry title to the center of the street, where it calls specifically for the side of the street: *Sibley v. Holden*, 10 Pick. 249; 20 Am. Dec. 521, and note. See also *Smith v. Slocomb*, 9 Gray, 36; 69 Am. Dec. 274, and note.

MECHANICS AND TRADERS BANK v. SEITZ.

[150 PENNSYLVANIA STATE, 682.]

BANKS AND BANKING — DUTY OF BANK TO APPLY DEPOSIT TO PAYMENT OF NOTE. — When a bank becomes the holder of a note for value in the ordinary course of business, and before maturity, it takes it relieved of equities existing between the original parties, and may recover on its title as holder. While it may appropriate funds in its hands belonging to any previous party to the note to its payment, when payment is not made at the time and place named, yet it is not bound to do so, except as to the maker.

BANKS AND BANKING — DUTY OF BANK TO APPLY MAKER'S DEPOSIT TO PAYMENT OF NOTE. — When a bank is the *bona fide* holder of a note at its maturity, and also holds funds of the maker, it is bound to consider the interests of the indorsers or sureties, and to apply such funds to the payment of the note. If it allows the maker to withdraw his funds after protest, causing the indorsers to lose thereby, it is liable to them.

BANKS AND BANKING — DUTY TO APPLY DEPOSIT TO PAYMENT OF NOTE. — When a bank is the holder of an indorsed note at maturity, the maker cannot require the bank to apply the indorser's funds on deposit to its payment, nor complain if the bank refuses to do so.

BANKS AND BANKING — APPLICATION OF INDORSER'S DEPOSIT AS PAYMENT OF NOTE. — When a bank becomes the holder of an indorsed note, acquired before maturity, for value, and without any notice of equities, and its clerk charges the note to the account of the indorser upon its maturity and protest, but afterwards, by direction of the bank cashier, corrects this, by entry of a credit, so as to make the indorser's account stand as before, the act of the clerk in so charging up the note is not a payment divesting the title of the bank, nor is the subsequent entry of the credit so made a new purchase of the note after protest, and subject to the equities between the original parties to it, but the bank may still recover on the note against the maker.

Russell C. Stewart, for the appellants.

Charles F. Walter, for the appellees.

WILLIAMS, J. The defendants are brewers in the city of Easton. In February, 1890, they bought from the New Process Ice and Refrigerating Company a refrigerating-machine for use in their business. In the following June, they gave in part payment for the machine their negotiable note for fifteen hundred dollars, payable at the First National Bank of Easton at ninety days. The company transferred this note, a day or two after it was given, to its president, J. J. Hayes, in consideration of his payment of bills, then maturing, to an amount equal to or greater than the note. He soon after indorsed the note to the plaintiffs' bank, which discounted it, placing the proceeds to his credit. The bank thus became the owner of the note in the usual course of business, for full value, before maturity, and without notice of any equities between the maker and the payee, if any such existed. When it fell due it was sent to the bank at which it was payable for collection. It was not paid, and was returned to the holder duly protested. Upon this state of facts, the maker, the payee, and the indorser were severally liable to the bank, and were liable to each other in the order in which their names stood as parties to the instrument.

Hayes kept an account at the bank, and when the note was returned protested, the balance in his favor was sufficient to cover the amount due upon it. A clerk, in accordance with what he considered a business habit, charged the note up to Hayes's account on the books of the bank; but when this fact came to the notice of the cashier, he told the clerk that this was not as they intended, and directed him to correct his act, by crediting Hayes with the same amount, so as to leave his account to stand as before.

The bank then brought this suit against the makers. They allege they have a defense against the payee; and to deprive the plaintiff of its position as a holder in due course of business and before maturity, they contend that it was the duty of the bank to charge up the note against the balance due to Hayes, and that the existence of this balance was payment in law.

They further contend that, at all events, the act of the clerk in charging up the note was payment in fact, that divested the title of the bank; and that the subsequent credit, made under the direction of the cashier, is not to be treated as the correction of a mistake, but a new purchase of the note, made after protest, and subject to the duty to inquire, which the law imposes on the purchaser of overdue and dishonored paper.

It is practically conceded, and it is clear upon the facts as they are presented to us, that unless the defendants' theory can be sustained, they cannot defend successfully in this case. The bank, if a holder for value in the ordinary course of business before maturity, is not subject to the equities growing out of the sale of the refrigerating-machine, and must recover on its title as the holder. We come, then, to inquire what was the duty of the bank in regard to the deposit standing to the credit of Hayes. The general rule is well settled, that while the bank may appropriate funds in its hands belonging to any previous party to the note, to the payment of it, when payment is not made at the time and place named, yet it is not bound to do so. The note may be treated as, in effect, an order or check authorizing the bank to apply the deposit to the payment, but the deposit is not payment in law. Even as between the bank and the maker, the bank is not bound to make the application, but may take the risk of its ability to collect from him and allow him to withdraw his deposit: *Morse on Banks and Banking*, 559. But where the bank holds funds of the

maker when the note matures, it is bound to consider the interests of the indorsers or sureties, and if it allows the maker to withdraw his funds after protest, and the indorsers are losers thereby, the bank is liable to them: *Commercial Nat. Bank v. Henniger*, 105 Pa. St. 496; *German Nat. Bank v. Foreman*, 138 Pa. St. 474; 21 Am. St. Rep. 908. The reason of this rule is, that the maker is the principal debtor, and liable to all the indorsers, whose undertaking is to pay if he does not. If the holder surrenders the money or securities of the maker, he parts with that in which all who have a right to look to the maker for indemnity have a definite interest; and if his act inflicts loss on them, he must stand, as to the money or securities surrendered, in the place of the maker. As the maker is liable to the indorser, it is very plain that he cannot require the bank to appropriate the indorser's funds to the payment of his own note, nor complain if the bank refuses to do so. He has no business with the state of accounts between the indorser and the bank; but it is his duty to relieve the indorser by the payment of the note in accordance with its terms.

Nor was there any payment in fact in this case. The indorser did not authorize the application of his deposit to this note, but insisted that the bank should proceed against the makers. The bank agreed to this. The unauthorized charge made by the clerk was at once corrected by the cashier; the deposit of the indorser was left subject to his check, and the bank by this action called on the makers to make good their promise to pay. We see no reason why they should not.

The first, second, third, and fourth assignments of error are sustained, also the tenth, eleventh, twelfth, and thirteenth.

The judgment is reversed, and a *venire facias de novo* awarded.

BANKS — DUTY OF BANK TO APPLY DEPOSIT TO PAYMENT OF NOTE — Where a bank is the holder of a note payable at the bank, and at its maturity the maker has a cash deposit in the bank sufficient to pay it, not specially applicable to any particular purpose, the bank is bound to charge the amount of the note against the deposit: *German Nat. Bank v. Foreman*, 138 Pa. St. 474; 21 Am. St. Rep. 908, and note. When an insolvent debtor, who assigns for the benefit of his creditors, is indebted to a bank in which he has money on deposit, the bank may apply the deposit to the debt, though the debt had not matured at the time of the assignment: *Kentucky Flour Co. v. Merchants' Nat. Bank*, 90 Ky. 225. In an action against a bank to recover money of a depositor, which was applied by the bank in payment of certain

notes, the defense of a banker's lien cannot be raised, if the notes had not come to maturity, and the defense was not made in the pleading: *Gardner v. First Nat. Bank*, 10 Mont. 149. When a promissory note, negotiable and payable at a bank, is sent to the bank properly indorsed for collection, it can pay the note out of the general funds of the maker, and charge his account with the amount: *Bedford Bank v. Acoam*, 125 Ind. 584; 21 Am. St. Rep. 258, and note with cases collected discussing this subject. See also *Shipman v. Bank*, 126 N. Y. 318; 22 Am. St. Rep. 821, and note.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

RUOHS v. ATHENS.

[91 TENNESSEE, 20.]

MUNICIPAL BONDS — VOID CHARTER. — A corporation having no legal existence has no legal power to issue bonds or obligations of a binding character, though it is acting as a municipal corporation and in the apparent exercise of legal corporate power. This rule does not apply to municipal corporations whose organization is irregular merely; but if the constitution or a statute declares that certain acts done or omissions occurring in an effort to organize such corporation shall render void the attempt to organize it, the court will not disregard such prohibition at the instance of a creditor deceived by the appearance of a legal organization.

OPINIONS OF AN APPELLATE COURT, OF WHAT CONCLUSIVE. — The effect of an opinion must be determined from examining it, and ascertaining therefrom what the court had agreed to upon consultation. The court concurs in and is bound by the opinion as it appears, and not by any thing outside of it, and its effect cannot be limited by looking into the record and showing that there were other and different facts upon which the court might have acted and founded its judgment.

Dewitt, Thomas, and Dewitt, and Pritchard, Sizer, and Thomas, for the plaintiff in error.

Robeson and Gaston, P. B. Mayfield, and Burkett, Mansfield, and Turley, for the defendant in error.

SNODGRASS, J. Complainant brings this suit to recover of defendant, alleged to be an incorporated town of this state, the amount now due him upon certain interest-bearing bonds issued by defendant on October 1, 1888. There were twenty-two of these bonds, of the denomination of one thousand dollars each, payable to bearer October 1, 1908, with interest at six per cent, payable semi-annually, evidenced by coupons

attached. They were issued to the Nashville and Tellico Railroad Company in consideration for stock subscribed by defendant. The bonds were purchased by complainant, who is a *bona fide* holder, and they were regularly issued, and under proper legislative authority, and are valid and binding obligations of defendant, if defendant is a legally incorporated city, or if, as between itself and complainant, it cannot rely on the defense of non-corporate existence now interposed.

At the time of the issuance of said bonds, and for some years prior thereto, it was acting as a corporation. As such it issued the bonds through its proper officers, and under its corporate seal, with such recitations as were proper, and showed the legality of the bonds in case they were issued by the corporation duly organized.

It did assume a legal existence as a municipal corporation, and legal power as such to issue the bonds. Legislative power thus assumed existed to issue the bonds, if it were a corporation, and the first question is, Was it a corporation legally, as well as in fact, organized?

It appears that the town of Athens was originally incorporated by the county court of McMinn County, in the year 1860, under code, sections 1349 et seq., but that that organization of the corporation was superseded by the organization of the town as a municipal corporation under the act of 1869-70, chapter 69, sections 39 et seq., pages 500 et seq.; that the act of 1869-70 was repealed by the act of 1879, chapter 255, page 296, and said repeal was accepted and acquiesced in; that the town was without municipal organization or government until June or July, 1881, when an attempt was made to organize said town into a municipal corporation under the act of March 25, 1877 (Acts 1877, c. 121, amending Acts 1875, c. 92), which attempt was void because the certificate of the sheriff holding the election was not indorsed on the application and registered with it, as required by section 8 of the act of 1877, chapter 121.

This was the defense set up by defendants, the last board of mayor and aldermen of the town, averring, in consequence, that all acts under such attempted incorporation were void, together with further plea that they had resigned, and their resignations had been accepted before the filing of complainant's bill.

We state the above facts respecting the incorporation and repeals, and effort to reorganize and failure, because, without

elaborating the propositions or debating the questions involved in the statement, we hold them to be settled as stated, and time forbids that we should attempt the detailed answer to the able and elaborate arguments of complainant's counsel to the contrary which these arguments so well merit.

It is sufficient to say that it has been settled that the act of 1879 repealed the charter of 1870, and this did not revive the incorporation of 1860: *Burk v. State*, 5 Lea, 349.

It is said, this case should not be followed; that it was upon an agreed statement of facts; and even if correct thereon, is erroneous on the real facts. It does not appear to be on an agreed statement of facts, and we cannot look outside the opinion to determine that question. What appears in an opinion is the matter submitted to the court and agreed to in consultation, and not that which might have existed and not been submitted. The court concurs in an opinion as it appears, and is bound by it, and not by anything outside of or beyond it. The record cannot be looked to to correct or change it. But besides, the opinion deals with the question of effect of repealing statutes which could not have appeared differently to the court then and now.

In this opinion a litigation fairly involving the very questions now in issue was discussed and disposed of. It is conclusive, and we have no disposition to review it.

Here the repealing act of 1879 was held valid, but in this case it is again assailed as void under section 17 of article 2 of the constitution, providing that "acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended."

The act is not open to this objection. It does, in its caption, recite the title of the act repealed.

It is not necessary to pursue the argument of complainant's counsel that this repealing act is an exception because the title of the act repealed conveyed no idea of the purpose of the last act. The act, by reference to that repealed, when the latter was read, did show its purpose. It would mislead no one who read the act referred to.

The town of Athens was therefore not incorporated when it made an effort to organize under the act of 1877. That effort failed, for the reason that the certificate of the sheriff holding the election was not indorsed on the application for charter and registered with it. The charter was therefore

void by express provision of the statute: Acts 1877, c. 121, sec. 8, p. 146; *Hooper v. Rhea*, MS., Knoxville, 1885.

It consequently follows that the town of Athens was not a legally incorporated town when it issued the bonds in question. This brings us to the most serious question in the case: whether the defendant can now rely on the defense of no corporate existence, having acted as a corporation and issued the bonds while in apparent exercise of legal corporate power. This is a question of much difficulty. There is a line of most respectable cases on the negative of the proposition stated, but in none of them is the question determined that a corporation attempting to organize under a general law which declares that the charter shall be void for non-compliance with special provisions thereof shall be held, by estoppel or otherwise, to be a corporation. But whatever may be the rule held elsewhere, it is settled here, in cases most maturely considered, that a body or corporation having no legal existence has no legal power to issue bonds or obligations of a binding character, and that such body or corporation does not obtain a *de facto status* so as to require a direct proceeding by the state to avoid its existence or its acts. In the two opinions in *Hooper v. Rhea*, already referred to, the last proposition is settled, and the first is determined in certain cases in this state, cited and approved in case of *Norton v. Shelby County*, 118 U. S. 425.

The rule here established, and which met the approval of that court in that case, was, that want of power to issue involved want of legal creation of the body which did issue the bonds, and that if there was no *de jure* office created which could be filled, there could be no *de facto* officer filling it; if there was no *de jure* corporation, it could have no *de facto* representation. This is a sound view, and we reassert it as correct.

Such a rule would not, of course, apply to irregularly organized corporations, or those which obtained such validity by special grant of the state or compliance with general law as to be merely voidable organizations, and such as the state, by direct proceeding, could alone dissolve; but where the constitution or the statute provides that acts done or omissions occurring in effort to organize a municipal corporation shall render the attempt to organize and the charter invalid, and of no force whatever, it is not left to the court to disregard this statutory or constitutional prohibition at the instance of a

creditor deceived by the appearance of an organization. It was his duty to ascertain,—1. Is there a legal corporation? and 2. Has it power to issue the bonds proposed to be sold. He must, at his peril, determine both questions for himself.

The decree is affirmed, with cost.

MUNICIPAL BONDS. — This subject is extensively treated in the notes to *De Voss v. City of Richmond*, 98 Am. Dec. 664-691, and *Deming v. Inhabitants of Holton*, 18 Am. Rep. 259-269. A purchaser of municipal bonds is bound by the law under which they are issued, and the law informs him that the bonds impose no obligation, unless issued according to the law: *Diamond v. Lawrence County*, 37 Pa. St. 353; 78 Am. Dec. 429; *Aurora v. West*, 22 Ind. 88; 85 Am. Dec. 413; *Kahn v. Board of Supervisors*, 79 Cal. 388. Municipal bonds issued in excess of the number and amount authorized by law are void: *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442. See also, as to power of municipal corporation to set up plea of *ultra vires* in regard to the issue of negotiable paper, *Clark v. Des Moines*, 19 Iowa, 199; 87 Am. Dec. 423; *Bissell v. Kankakee*, 64 Ill. 249; 16 Am. Rep. 554.

O'BRYAN v. GLENN.

[91 TENNESSEE, 106.]

ASSIGNEE FOR THE BENEFIT OF CREDITORS IRREVOCABLY ELECTS to treat the assignment as void if he files an attachment bill against the assignor alleging the assignment to be fraudulent and void, although his action was prompted by the mistaken advice of his attorney respecting the validity of the assignment. It is not material that no loss or injury occurred to any one from the proceeding taken by the assignor in hostility to the assignment.

Hughes and Hatcher, and Figuers and Padgett, for the plaintiffs.

George P. Frierson, for the defendants.

LEA, J. On June 29, 1891, the Glenn Brothers, merchants and residents of Maury County, made a special assignment of their stock to J. W. and C. A. Lee, for the purpose of securing, in the order named, the following indebtedness: 1. A debt of \$350 to C. A. Lee; 2. A debt of \$565 to O'Bryan Brothers; and lastly, a debt of \$371 to the Connell-Hall-McLester Company. On the same day the deed was filed for registration. The trustees were given power to take immediate possession of said stock of goods, to sell the same at once, and appropriate the proceeds to the payment of costs, then to the debts named, in the order indicated.

On the day after the deed was filed for registration, J. W. and C. A. Lee, who reside in Williamson County, came to Columbia to examine into the matter. They went to the register's office, procured the deed, or a copy thereof, and carried it home with them. While in Columbia, C. A. Lee asked the opinion of a lawyer in regard to the trust deed, who told him there was nothing for him to do but to accept the trust, qualify, and execute the same. Two days afterward, the Lees went to Franklin, as C. A. Lee says, to seek advice in regard to his duties, liabilities, and rights under the deed. Upon reaching Franklin, they showed the deed to a bank cashier and a grocery merchant, who advised them that the deed was worthless, and advised them to consult an attorney. They did so, and he advised them the deed was invalid, and void, as contravening the general assignment statute. Thereupon, at the instance of the attorney, an attachment bill was drafted, in which it was alleged that the deed was made to defraud the creditors of the Glenns, and especially the complainant C. A. Lee, and asking that the deed be declared fraudulent and void, and the property therein conveyed be attached, sold, and applied to the payment of the indebtedness of the Glenns to complainants.

The bill was sworn to, and C. A. Lee boarded the train and went to Pulaski, and obtained from the chancellor a fiat for an attachment. He returned to Columbia, and on July 3d he filed the bill in the office of the clerk and master, and thereupon an attachment was issued and placed in the hands of the sheriff, and the stock of goods conveyed in the assignment to the trustees, J. W. and C. A. Lee, was levied on by the sheriff. After this they again consulted an attorney at Columbia, who advised them that the deed of assignment was valid, and then, on July 9th, they dismissed the attachment bill. Afterward, they gave bond as trustees, and were proceeding to close the trust, when the bill was filed in this case against them and the Glenn Brothers, by O'Bryan Brothers and the assignee of the Connell-Hall-McLester Company, the two other creditors named in the assignment, to have a receiver appointed, and to exclude C. A. Lee from any benefit under the trust, as he had repudiated the same, alleging that the filing of the attachment bill was an election to renounce the trust.

The Lees answered, and admitted the facts above set forth, but insisted that they filed the attachment bill under the

advice of an attorney, and alleged and proved that there was no loss or injury of any kind to the property attached from the date of attachment to the dismissal of the bill.

Upon the hearing, the learned chancellor held that there being no loss or injury to the property, and as complainants suffered no loss or injury to their rights or interest in the premises, that defendants, J. W. and C. A. Lee, did not, by the filing of their attachment bill, lose their right to act as trustees and to execute the trust, and that the defendant C. A. Lee did not thereby forfeit or lose his rights under said deed, and complainants' bill was dismissed.

The action of the court was erroneous. The defendants could elect to take under the assignment, or they might renounce the same and attack the assignment, but a creditor cannot be permitted to assail and claim under an assignment. It has been held by this court, and it is sustained by all the authorities, that any distinct and unequivocal act of renunciation of the benefits of a deed by any of the creditors intended to be benefited will operate against any further claims under the deed: *Farquharson v. McDonald*, 2 Heisk. 419.

They elected to renounce and repudiate the benefits of the assignment when they filed the attachment bill alleging that the assignment was fraudulent and void: *Terry v. Munger*, 121 N. Y. 167; 18 Am. St. Rep. 803. But it is insisted that the attachment bill was filed by the defendants under a mistaken view of the law by an attorney. This can make no difference. The Lees were acquainted with all the facts in the case, and that they were wrongfully advised cannot, of itself, destroy or render nugatory their renunciation of the benefits under the assignment: *Bell v. Steel*, 2 Humph. 148.

It is further insisted that complainants in this case suffered no loss or injury to their rights or interest by the filing of the attachment bill and the attaching of the assigned property, and therefore that they are not estopped to assert their rights under the deed of assignment. Bigelow on Estoppel, 5th ed., 573, says: "The election, if made with knowledge of the facts, is in itself binding; it cannot be withdrawn without due consent, although it may not have been acted upon by another by any change of position." Herman, in his work on estoppel, ed. 1886, p. 1177, says: "One entitled to a benefit under an instrument, whether it be a will or any contract, if he claims the benefits of such instrument, he must abandon every right the assertion whereof would defeat even partially the

provisions of the instrument. A party cannot occupy inconsistent positions, but will be confined to his election." In *Louisville etc. Co. v. Nashville etc. Co.*, 2 Swan, 282, it is said: "In case of election, the rule is, if a person determines his election, it shall be forever determined."

The question is, Has an election been made by a direct and unequivocal act? If so, he must stand by it, and his future action cannot be changed by the fact that others were not injured; and therefore it was wholly immaterial whether any loss or injury was sustained by complainants between the filing of the attachment bill and its dismissal.

The result is, that the decree of the court dismissing complainants' bill is reversed, and this cause will be remanded for the purpose of having said trust executed under the directions of the court, in accordance with this opinion. The defendants, J. W. and C. A. Lee, will pay the cost of this court and of the court below.

ELECTION BETWEEN REMEDIES, WHEN IRREVOCABLE: See note to *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 487-494. Creditor cannot claim under assignment for benefit of creditors, after resisting the assignment by setting up a claim antagonistic to it: *Evins v. Cook*, 85 Tenn. 332; 4 Am. St. Rep. 765.

TENNESSEE MANUFACTURING COMPANY v. JAMES.

[91 TENNESSEE, 154.]

PARENT AND CHILD. — CONTRACT SIGNED BY A MINOR AND HER FATHER, respecting wages to be earned by her, is, in law, the contract of the father, and therefore cannot be avoided or disaffirmed by her. Hence, if such contract stipulates that the wages shall be paid to her, but that if she leaves the employment without first giving two weeks' notice, or fails to work faithfully during the period of two weeks after giving notice of the intention to leave, then that a sum specified shall be forfeited to her employer as liquidated damages, and may be deducted from wages due, such stipulation is valid and enforceable.

DAMAGES, CONTRACT FOR LIQUIDATED, WHEN SUSTAINABLE. — A sudden breaking off of a contract for services by either party involves such difficulties concerning the actual loss as renders a reasonable agreement for stipulated damages appropriate and valid. Therefore, if a contract for services stipulates that if the employee shall leave the service without giving two weeks' previous notice of his intention so to do, he shall forfeit a specified sum, which may be deducted from wages due him, such stipulation is valid, especially if the circumstances and nature of the employment are such that it will be difficult to calculate with any certainty the actual loss resulting from abandoning the employment without previous notice.

advice of an attorney, and alleged and proved that there was no loss or injury of any kind to the property attached from the date of attachment to the dismissal of the bill.

Upon the hearing, the learned chancellor held that there being no loss or injury to the property, and as complainants suffered no loss or injury to their rights or interest in the premises, that defendants, J. W. and C. A. Lee, did not, by the filing of their attachment bill, lose their right to act as trustees and to execute the trust, and that the defendant C. A. Lee did not thereby forfeit or lose his rights under said deed, and complainants' bill was dismissed.

The action of the court was erroneous. The defendants could elect to take under the assignment, or they might renounce the same and attack the assignment, but a creditor cannot be permitted to assail and claim under an assignment. It has been held by this court, and it is sustained by all the authorities, that any distinct and unequivocal act of renunciation of the benefits of a deed by any of the creditors intended to be benefited will operate against any further claims under the deed: *Farquharson v. McDonald*, 2 Heisk. 419.

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visions of the instrument. A party cannot occupy inconsistent positions, but will be confined to his election." In *Louisville etc. Co. v. Nashville etc. Co.*, 2 Swan, 282, it is said: "In case of election, the rule is, if a person determines his election, it shall be forever determined."

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DAMAGES, CONTRACT FOR LIQUIDATED, WHEN SUSTAINABLE. — A sudden breaking off of a contract for services by either party involves such difficulties concerning the actual loss as renders a reasonable agreement for stipulated damages appropriate and valid. Therefore, if a contract for services stipulates that if the employee shall leave the service without giving two weeks' previous notice of his intention so to do, he shall forfeit a specified sum, which may be deducted from wages due him, such stipulation is valid, especially if the circumstances and nature of the employment are such that it will be difficult to calculate with any certainty the actual loss resulting from abandoning the employment without previous notice.

DAMAGES. — THE RIGHT OF AN EMPLOYEE TO DEDUCT A SUM SPECIFIED AS LIQUIDATED DAMAGES from the wages of an employee, who leaves the service without first giving previous notice of his intention to do so, as stipulated in a contract of employment, cannot be defeated by the employee returning on the next day after quitting work, and offering to work out her notice.

Dickinson and Frazer, for the plaintiff.

E. J. Wickware, for the defendant.

LURTON, J. Minnie James, a minor, was an employee of the appellant, a corporation engaged in the manufacture of cotton goods. The contract of employment was in writing, and was with the minor and her father. By one of the provisions of this contract it was stipulated that the employee should give two weeks' notice of her intention to quit. It is further provided that in case she should leave without giving two weeks' notice, "or fail or refuse to faithfully work during a period of two weeks after giving notice of an intention to leave, then it is hereby agreed that the amount stated below for the class to which I may belong is agreed upon as liquidated damages due said Tennessee Manufacturing Company at the time of my failure to comply with the terms of this contract, to compensate it for all damages, both actual and exemplary, and all loss arising from my failure to carry out the terms of this agreement; and it is further agreed upon, that said amount applicable to the class of employees to which I may belong shall be deducted from any sum which may be due me by said company, whether on account of services rendered, or otherwise."

The class to which appellee belonged was that of those receiving fifty cents per day and under one dollar. The damages stipulated for this class was ten dollars. At the foot of this agreement, which was signed by appellee, was this further agreement, signed by her father: "The foregoing agreement has been read by me, and, fully understanding the same, it is also agreed to by me as binding both me and my daughter, Minnie James, who is legally disqualified from making this contract, to all its terms and conditions. I agree further, that said Minnie James is hereby authorized to receive the wages of said work, and that all sums paid to said employee are to be accepted as fully discharging all liability, to the full amount so paid, and said wages are to be subject to all the conditions of this contract as though said employee was legally empowered to act in person."

Appellee gave notice of her intention to leave, and thereafter worked ten days, but at the end of that time quit without any excuse. At the time she quit, there was due her twenty days' wages, including the ten days after her notice.

If the stipulation as to damages is invalid, then the company is due her ten dollars; if valid, then nothing is due her. Upon quitting, she brought suit, by her father as next friend, upon a *quantum meruit*. The contract has been set up as a defense to her suit.

The circuit judge, being of opinion that the contract was invalid, as being one with a minor, who had a legal right to repudiate same, gave judgment for the plaintiff. In this we think his honor erred. If the contract had been alone with the minor, she might undoubtedly repudiate it, and recover upon a *quantum meruit*. The law would give the infant the privilege of judging whether such a contract was beneficial or not, and of avoiding it if she elected to do so, and recovering the value of her services as if she worked without any contract: 10 Am. & Eng. Ency. of Law, tit. Infant.

But this contract was in law with the father, who agreed that the wages, in law due to him, might be paid over to his child, "subject to all the conditions of this contract." The wages of a minor, peculiar circumstances out of the way, are due to the father. This springs from his legal duty to support and educate his child. He may permit the minor to take and use his own earnings. This is called emancipation, and emancipation will be a defense to the father's suit for the minor's wages. It may be express or implied, entire or partial. It may be conditional. It may be in writing, or oral; for the whole minority, or for a shorter term; as to a part of the child's wages, or as to the whole. Emancipation will not enlarge the minor's capacity to contract; it simply precludes the father from asserting his claim to the wages of his child: Bishop on Contracts, sec. 898.

If one employ a minor with notice of the non-emancipation of the infant, it will be no defense to the father's suit for the wages that the child has received them. On the other hand, payment to the father will be no defense to the minor's suit, if the employer knew of the fact of emancipation. These principles of the common law are well settled, and have not been affected by statute: *Cloud v. Hamilton*, 11 Humph. 105; 53 Am. Dec. 778.

The cases in America are collected in a note to *Wilson v.*

McMillan, 62 Ga. 16; 35 Am. Rep. 117. In view of these principles, we must construe the contract of the father as an emancipation, subject to the conditions as to damages in case his child shall quit without cause and without the stipulated notice. It is as much as if he had said: "My child is a minor. As such, I am entitled to her wages. I am willing that she shall work in your mill, and that the wages she may earn shall be paid to her. I agree that she shall comply with this contract, and if she does not, then the wages legally due me shall be detained by you to the extent provided in the contract I make for her; and only such wages paid to her as I would be entitled to receive if the contract were exclusively with me." This was a conditional emancipation, under a special contract made by and with the father for himself and his child. Her emancipation was partial. The father, having a legal right to her entire wages, has stipulated that none shall be paid her beyond the sum due under this agreement with him. If this contract is binding on him, the minor cannot recover beyond its limits. If the contract is invalid as to him, as stipulating for a penalty, then it will not be in the way of plaintiff's suit.

We agree with the circuit judge in holding that this contract does not fall within the case of *Schrimpf v. Tennessee Mfg. Co.*, 86 Tenn. 219; 6 Am. St. Rep. 832. That case concerned a contract construed as stipulating for a penalty in case of a breach. It was held not to be an agreement for liquidated damages, because the forfeiture covered all the wages due at time of breach, regardless of amount due, and regardless as to whether the arrearages were the consequence of the default of the company. It was a contract harsh and unconscionable. It preserved no proportion between sum forfeited and the actual damages, and put all employees upon same footing, whether much or little was earned, much or little due, when breach occurred. The damages were to be all that was due in any case. To one, this might have been the wages of months; to another, the earnings of but a day. But in that case Chief Justice Turney quoted and indorsed the language of Campbell, J., in *Richardson v. Woehler*, 26 Mich. 90, where he said: "We have no difficulty in holding that the injury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within

which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed on, and shall not be unreasonable, or an oppressive exaction, there would seem to be no legal objection to the stipulation, if both parties are equally and justly protected."

Applying these principles to the case for judgment, we have no difficulty in holding that the stipulation here is for liquidated damages, and not for a penalty, and that the contract is neither unreasonable nor oppressive. "The tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered, and the recovery limited to such damages. This tendency and preference, however, does not exist where the actual damages cannot be ascertained by any standard. A stipulation to liquidate damages in such cases is considered favorably": 1 Sutherland on Damages, 490.

This contract of employment on its face affords no *data* by which the actual damages likely to result from its non-observance can with any certainty be ascertained. Such a circumstance has been regarded as justifying the courts in holding the sum stipulated as liquidated damages.

The plaintiff in error was a cotton-mill, having in its employment hundreds of hands. The work is divided into many departments. The raw material is handled by one set of hands, and put in condition for another, and the second department still further advances its manufacture; and so on through successive stages of progress. The evidence shows that each department is dependent upon that immediately below it. Now, if the operatives of one department quit, or their work is delayed, its effect is felt in all, to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will, to some extent, affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise, actual loss due to an unexpected breach of an employee's engagement; though it is shown that there are some departments of work where the quitting of a small number of hands, without notice, would stop the entire mill, and throw other hundreds out of employment. In this day of great factories, and the consequent division of labor into separate departments, a degree of interdependence among employees exists, which they ought, and do, recognize, and which makes the obligation of each to

the whole, and to the common employer, all the more important. The case is one, then, where the certainty of some damage, and the uncertainty of means and standards by which the actual damage can be ascertained, requires the courts to uphold the contract as one for liquidated damages, and not as providing for a penalty. The sum fixed is certain. It is proportioned to the earning capacity of the employee, and hence presumably with regard to the particular results of a breach in each department.

There is no hardship in the agreement requiring two weeks' notice. If the operative leaves for good cause, the contract would not apply. If able to work, the pay continues until notice has been worked out. That she returned the next day after quitting, and offered to work out her notice, is no compliance. The mischief had been done. She had voluntarily, and without pretense of excuse, or asking to be released, gone off, and left her work standing, and endeavored to get others to go with her. The damages had accrued, and, under the facts of this case, appellant was not bound to restore her.

Reverse. Judgment here for plaintiff in error.

CONTRACTS FOR SERVICES OF MINORS: See a general discussion of the subject in the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 619-625.

DAMAGES, WHAT ARE DEEMED TO BE LIQUIDATED. — Whether a sum constitutes liquidated damages, or a penalty, is a question of construction, arrived at by considering whether the agreement contains one or several stipulations, whether such stipulations vary in importance, whether the damages are in their nature certain or uncertain, or difficult of definite ascertainment, or whether, where the injury is certain, the sum fixed upon is proportionable or disproportionate to such injury, and the actual claim which grows out of it: *Foley v. McKeegan*, 4 Iowa, 1; 66 Am. Dec. 107. A stipulation for liquidated damages will be enforced where it is manifest that ascertaining the actual damages would be difficult, and the parties agreed on the amount named for the purpose of avoiding the expense and difficulty of doing so: *Cotheal v. Talmage*, 9 N. Y. 551; 61 Am. Dec. 716; *Hamilton v. Overton*, 6 Blackf. 206; 38 Am. Dec. 136; *Studabaker v. White*, 31 Ind. 211; 99 Am. Dec. 628; unless the sum fixed is greatly disproportionate to either the actual or presumed damage, showing that one side was the victim of oppression: *Morse v. Rathburn*, 42 Mo. 594; 97 Am. Dec. 359; *Ward v. Hudson River B. Co.*, 125 N. Y. 230; *Clements v. Schuyler etc. R'y Co.*, 132 Pa. St. 445.

MASTER AND SERVANT — AGREEMENTS TO FORFEIT WAGES. — In *Pottsville Iron etc. Co. v. Good*, 116 Pa. St. 385, 2 Am. St. Rep. 614, an agreement by an employee to forfeit all that was due to him at the time of leaving, if he did not give fourteen days' notice, was held valid and enforceable. But such an agreement, by a minor acting for himself, would not be enforceable, and the

damages occasioned by his leaving without notice could not be deducted from the amount he would otherwise be entitled to receive: *Derocher v. Continental Mills*, 58 Me. 217; 4 Am. Rep. 286.

RAILROAD v. DIES.

[91 TENNESSEE, 177.]

RAILROAD CORPORATIONS ENGAGED IN CARRYING LIVE-STOCK cannot, by contract, exempt themselves from liability for their own negligence.

RAILROAD CORPORATIONS — SHIPPER, WHEN NOT ESTOPPED BY HIS CONTRACT.

— Agreement, in a contract for the shipment of live-stock, that the shipper has examined and found in good order the cars provided for transportation of his stock, and accepts the same, and agrees that they are suitable and sufficient, does not estop him from proving that such stock was injured by a defect in one of the cars, nor from recovering damages sustained from such defect.

RAILROAD CORPORATIONS USING CARS OF OTHER CORPORATIONS. — CARRIER CANNOT ESCAPE RESPONSIBILITY by carrying its freight in cars furnished by or owned by another corporation.

RAILROAD CORPORATIONS SHIPPING STOCK IN "PALACE HORSE-CAR," procured from another corporation at the request of the shipper, is nevertheless liable for any injury resulting to stock from a defect in such car.

Baxter Smith, for the plaintiff.

Stokes and Stokes, for the defendant.

LURTON, J. Mr. Dies shipped from Nashville a car-load of live-stock, destined to San Antonio, Texas. The shipment was upon special terms, contained in a printed live-stock contract. One of the stipulations in this contract was in these words: "And it is further understood and agreed that said party of the second part has examined and found in good order the car or cars provided by the said party of the first part for the transportation of said animals, and hereby accepts the same, and agrees that they are, as thus provided, suitable and sufficient for said purpose."

There was evidence tending to show that a stallion shipped under this contract sustained injuries, due to a defect in the car, from which it died. There was a jury, and verdict for plaintiff.

The court was asked to charge, in reference to the provisions above quoted, "that the live-stock contract that was read in evidence having been signed and held by plaintiff, and he having acted under it, and that by one of the terms of it

the plaintiff acknowledges that the car in which the stock was shipped was safe and sufficient, he is now estopped from alleging that it was unsafe and unsuitable."

This was refused. This was not error. Railway companies are common carriers of live-stock, and incur the same liability as carriers of other property, subject only to the limitation that they are excused if the loss is attributable to the intrinsic qualities or nature of the animal. But it is equally as well settled that they may limit this common-law liability as insurers by a special contract, on sufficient consideration, provided such exemption shall not operate to exempt them from the consequences of their own negligence. The duty of a common carrier of freight is to furnish cars suitable and safe. Any failure in this regard which could have been avoided by due care is negligence.

If this agreement to accept this car as safe and suitable is to be construed as estopping the shipper from relying upon the fact that it was not safe or in repair, then the effect of the contract would be to release the carrier from the consequence of its own negligence in furnishing an unsafe vehicle.

If a shipper can conclude himself by his agreement as to the car in which his freight was shipped, he could, for the same reasons, agree as to the suitability and safety of the road-way, engines, etc. Such a contract would be invalid, as operating to cast upon the shipper the duty of inspecting and determining the safety and sufficiency of the means the carrier has provided for the discharge of his public duties. Its necessary effect would be to release it from liability for its own negligence in failing to provide safe and suitable vehicles. The effect of this agreement as evidence of the condition of the car, the defect relied on being quite an obvious one, if it existed at all, was fully covered by the charge as delivered; and the charge in this respect is not objected to.

The court was further requested to charge "that if the proof shows that the plaintiff was unwilling to accept an ordinary freight-car, such as the defendant could furnish, to ship his stock in, and that he had Mr. Champe to procure a palace horse-car for that purpose from a different company, he (plaintiff) paying that company for the use of its car, that then, and in that case, it was the duty of the plaintiff, or of the company from which he obtained the car, to inspect it and see that it was safe and sufficient for the purpose of shipping his stock in, and it was no part of defendant's duty to do so."

This was refused. The evidence shows that Mr. Dies did procure the agent of the railway company to get for his use a car known as an "Arms Palace Horse-car." This car was owned by an independent company, who were paid for its use by Mr. Dies. It was brought to Nashville, and there loaded with this stock, and then put in the train of the Louisville and Nashville company, who had contracted for the carriage of this stock. The place of such cars in modern transportation is well described by Mr. Champe, the agent of the railway company, through whom Mr. Dies contracted for its use. He says: "It is quite an advantage to defendant to use the said palace cars, and a great deal of stock is shipped that way; the defendant railway company procuring for the shipper such cars. These palace stock-cars occupy to the shipment of stock the same place that palace sleeping-cars do to passengers traveling over our road."

The carrier cannot escape responsibility by carrying its freight in cars furnished by or owned by another company. It was a common carrier with respect to this shipment, and it was a matter of no importance who owned or furnished or paid for the particular car into which this stock had been loaded. This has been thoroughly well settled with respect to its liability to passengers.

In the case of *Pennsylvania Co. v. Roy*, 102 U. S. 452, the passenger was injured by reason of a defect in a Pullman palace car in which he was riding. Although the car belonged to the Pullman company, and was in the immediate control of its own agents and employees, yet the supreme court of the United States was unanimously of opinion that this car being a part of the train under the control of the railway company made the latter liable for any defect in the car whereby one of its passengers was injured.

So in the case of *Louisville etc. R'y Co. v. Katzenberger*, 16 Lea, 880, 57 Am. Rep. 232, the railway company was held liable for the loss, by a passenger, of his hand-baggage while riding in a sleeping-car under the special care of the servants of an independent sleeping-car company; that the car made a part of the train of the railway company fixed its responsibility as a carrier. The rule applicable to the carriage of passengers in the cars of an independent company applies with full force to the carriage of stock in special cars owned by an independent company.

There was no error in refusing to charge as requested. The

other errors assigned have been examined; none of them are well taken.

Judgment affirmed.

COMMON CARRIERS, THEIR POWER TO LIMIT THEIR LIABILITY: See, generally, the notes to *Hollister v. Nowlen*, 32 Am. Dec. 468-470; *Cole v. Goodwin*, 32 Am. Dec. 495-507; *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 719-729. As to their power to limit the amount of their liability, in case of loss, to a sum less than the amount of the injury sustained, see extended note to *Chicago etc. R'y Co. v. Chapman*, 23 Am. St. Rep. 593-598. As to their power to limit their liability to persons injured while riding on free passes, see notes to *Perkins v. New York Cent. R. R. Co.*, 82 Am. Dec. 290-295, and *Bissell v. New York Cent. R. R. Co.*, 82 Am. Dec. 379, 380. The rule almost universally received is, that the carrier cannot, by any sort of stipulation, exempt himself from the consequences of his negligence. The following are the cases reported so far in the American State Reports which recognize this as the accepted rule: *McFadden v. Missouri Pac. R'y Co.*, 92 Mo. 343; 1 Am. St. Rep. 721; *Merchants' Dispatch etc. Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847; *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. St. 577; 4 Am. St. Rep. 670; *Missouri Pac. R'y Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758; *Alabama etc. R. R. Co. v. Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119; *Witting v. St. Louis etc. R'y Co.*, 101 Mo. 631; 20 Am. St. Rep. 636; *Chicago etc. R'y Co. v. Chapman*, 133 Ill. 96; 23 Am. St. Rep. 587. The modification of the general rule allowing carriers to limit their liability to an amount stated in a written receipt or special contract in the event of loss or injury to the goods through his ordinary negligence is illustrated in *Pacific Exp. Co. v. Foley*, 46 Kan. 457; 26 Am. St. Rep. 107. Unless, however, there is proof that a lower rate of freight was given on account of the limitation placed upon the value of the property, a contract limiting the damages recoverable will not control, where negligence is shown: *Adams Exp. Co. v. Harris*, 120 Ind. 73; 16 Am. St. Rep. 315.

RAILROAD COMPANIES, THEIR DUTIES AND LIABILITIES AS CARRIERS OF LIVE-STOCK: See extended note to *Clarke v. Rochester etc. R. R. Co.*, 62 Am. Dec. 208-217. A railroad company undertaking to carry live animals for hire is bound to provide safe and suitable cars: *Peters v. New Orleans etc. R. R. Co.*, 16 La. Ann. 222; 79 Am. Dec. 578; *Smith v. New Haven etc. R. R. Co.*, 12 Allen, 531; 90 Am. Dec. 166. A doctrine similar to that of *Pennsylvania Co. v. Roy*, 102 U. S. 451, cited by the court in the principal case, was adopted in *Railroad Co. v. Walrath*, 38 Ohio St. 461, 43 Am. Rep. 433, in which it was held that a railway passenger traveling in the coach of a sleeping-car company may properly assume, in the absence of notice to the contrary, that the whole train is under one management, and that where he sustains injury by the negligence of the sleeping-car company, he may maintain an action against the railroad company.

SIMMONS v. LEONARD.

[91 TENNESSEE, 183.]

WILL, EXECUTION AND ATTESTATION OF. — It is not necessary that a subscribing witness should see the testator sign the will, nor that he should subscribe it in the presence of the other witness.

A WILL MUST BE SUBSCRIBED BY AT LEAST TWO DISINTERESTED WITNESSES.

WILLS — WITNESS UNABLE TO WRITE. — **ATTESTATION OF A WILL BY A SUBSCRIBING WITNESS** MUST BE either by signing his name or by making his mark, when his name is written by another for him. It is not sufficient that his name was written by another for him, though at his request and in his presence, if he did not make his mark thereto.

WILLS — WITNESS'S NAME SIGNED FOR HIM BY INCOMPETENT PERSON. —

One competent to be a subscribing witness to a will cannot perform the act of subscription by another, who is legally incompetent to be a witness. Hence, if the name of a witness is subscribed by a devisee, such subscription is void.

WILLS — A SUBSCRIBING WITNESS MUST BE ABLE TO IDENTIFY THE WILL. —

Hence, if he did not see it nor hear it read, nor impress his name upon it, nor make any other mark by which, if remembered, he might recognize it, there can be no valid subscription. It is not sufficient that the will be identified by a person, other than the witness, from some mark which such other person placed upon it.

THE WILL MUST BE SIGNED BY THE TESTATOR BEFORE there can be any valid attestation or subscription, but it need not be signed in the presence of either witness, nor need either actually see the testator's signature. It is sufficient that the will be produced, signed by the testator, and in such a way that his signature may be seen by the witnesses, and that he request them to witness it as his will.

W. W. Walker, P. C. Smithson, and W. N. Cowden, for the plaintiff.

Jones and Murray, J. H. Lewis, Z. W. Ewing, W. Leonard, and L. A. Thompson, for the defendant.

CALDWELL, J. This is a contested will case. In February, 1877, Miss Margaret Simmons, who was both old and illiterate, died at her residence, in Marshall County, leaving a valuable tract of land and some personalty. In March following, a certain paper writing, alleged to be her last will and testament, and making disposition of her entire estate, was admitted to probate, in common form, in the county court of that county. Dr. John M. Leonard, the principal devisee, was qualified as executor at the same time.

In July, 1887, D. P. Simmons, a brother of the deceased, and other relatives, filed a bill in the chancery court, alleging that the said instrument was not her last will and testament, and seeking an account with the executor.

In pursuance of the direction of the chancellor in interlocutory order, complainants sought to make up and try an issue of *devisavit vel non* in the circuit court; but the circuit judge refused to take jurisdiction, because of the pendency of the suit in the chancery court.

On appeal in error, this court decided (89 Tenn. 622) that the circuit court alone had jurisdiction to try an issue of *devisavit vel non*, and thereupon remanded the case.

The honorable circuit judge thereafter tried the issue without a jury, and pronounced judgment in favor of the will. Contestants have appealed in error.

Our first inquiry shall be, whether or not Eleazar Cochran and W. F. McDaniel, whose names appear on the propounded instrument as those of subscribing witnesses, make out a case of due and formal execution under the statute. How that is can be determined only by a careful consideration of what they say occurred at the time, the certificate to which their names are attached being in proper form and reciting all necessary facts.

McDaniel testified that he was notified by Dr. John M. Leonard that Margaret Simmons wanted him to witness her will; that he afterwards went by Leonard's house, and they went together to her house; that she brought a paper out on the porch and told him she desired him to witness her will; whereupon he then and there, in her presence and at her request, signed his name to the paper as a subscribing witness; that he, at that time, saw the names of Margaret Simmons, the testatrix, and Eleazar Cochran, the other subscribing witness, upon the paper; that no one was then present except the testatrix, Dr. Leonard, a small negro, and witness; and finally, the paper in contest being produced, the witness said it was the same to which he subscribed his name, at the time and under the circumstances already detailed.

This witness shows himself to have been competent, and by his testimony makes a case of due execution, so far as one subscribing witness can make it.

It was not at all necessary that he should see the testatrix sign the paper, nor that he should subscribe it in the presence of the other witness: *Logue v. Stanton*, 5 Sneed, 98; *Rose v. Allen*, 1 Cold. 24; *Bartee v. Thompson*, 8 Baxt. 512; *Beadle v. Alexander*, 9 Baxt. 606; 2 Greenleaf on Evidence, sec. 676; 1 Randall and Talcott's *Jarman on Wills*, 212, 213; *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Jauncey v. Thorne*, 2 Barb.

Ch. 40; 45 Am. Dec. 424; *Burwell v. Corbin*, 1 Rand. 131; 10 Am. Dec. 494; *Ela v. Edwards*, 16 Gray, 92; *Tilden v. Tilden*, 13 Gray, 110; *Ellis v. Smith*, 1 Ves. Jr. 16; *Eelbeck v. Granberry*, 2 Hayw. 232; 2 Am. Dec. 624; *Johnson v. Johnson*, 106 Ind. 475; 55 Am. Rep. 762; 4 Kent's Com. *516; *Rosser v. Franklin*, 6 Gratt. 1; 52 Am. Dec. 97.

Cochran, the other subscribing witness, died before the trial, and therefore could not be examined in the presence of the court; but his deposition, which had been taken in the chancery cause, was used as evidence in this case.

He deposed that he was a neighbor of Margaret Simmons, deceased; that Dr. John M. Leonard called on him twice, and told him she wanted him to witness her will; that a negro man, living on her place, was subsequently sent for him, and he then went to her house; that he found her alone, and when he first got there she told him she wanted him "to sign a will" for her, though she did not then produce it, or say more about it; that Dr. Leonard afterward came and "got the will out of the bureau, or off the top of it," and then, at the request of witness, signed the name of witness to it; that this request was made by witness because he was so nearly blind that he could not see well enough to sign his own name; that he, witness, did not have the will in his own hands, or see the testatrix have it in her hands at any time; that she did not sign it in his presence, and he did not know whether she signed it before he went to her house or after he left, if at all; that he did not have the will read or learn its contents.

His name, without more, is attached to the certificate. It is "Eleazar Cochran," simply, and not "Eleazar ^{his} ~~x~~ _{mark} Cochran," as is usual when a person unable to write has another sign his name for him. There is no mark or sign to indicate that Cochran did not sign his own name, though the fact is, as he states himself, that it was written by Dr. Leonard at his request.

Clearly, Cochran was not a proper subscribing witness. He was competent in the sense of being disinterested, but the part he took in the execution of the alleged will did not give him the full character and functions essential to a subscribing witness. His evidence does not establish such a subscription as the law requires.

To constitute a valid will of real estate, the instrument must be subscribed by two witnesses at least, neither of whom is interested in the devise: Milliken and Ventrees's Code, sec.

3003; *Maxwell v. Hill*, 89 Tenn. 588; *Guthrie v. Owen*, 2 Humph. 202; 36 Am. Dec. 311; *Davis v. Davis*, 6 Lea, 543.

The attempted subscription by Cochran is incomplete because his name, being signed by another person, is not accompanied by some mark or sign indicating his adoption of that other person's act. This court has gone no further in liberal construction of the word "subscribe" than to hold that a person whose name is written by another, and who makes his mark thereto, is a good attesting witness to a will: *Ford v. Ford*, 7 Humph. 96, 97.

Though a mark so made is held to be a sufficient subscription, it is never advisable, where it can be avoided, to employ marksmen as witnesses: 1 Jarman on Wills, 213.

It seems to have been deemed sufficient not only because the name of the witness is written by his authority, but also because in making his mark he has a share in the writing, as when another person guides his hand and he makes his own signature: *Chase v. Kittredge*, 11 Allen, 49; 87 Am. Dec. 694; *Jesse v. Parker*, 6 Gratt. 57; 52 Am. Dec. 102; *Montgomery v. Perkins*, 2 Met. (Ky.) 448; 74 Am. Dec. 419.

By statute, the word "'signature,' or subscription, includes a mark, the name being written near the mark, and witnessed": Code, sec. 48.

There is even a greater objection, if possible, to Cochran as a subscribing witness. Though not interested in the devise himself, Dr. Leonard, who wrote his name for him, was the principal devisee under the will. This made the subscription utterly ineffectual. Cochran, though legally competent to become a subscribing witness, could not effectively perform the act of subscription through another person, who was legally incompetent to become such witness in his own name and right. To permit the devisee to write the name of the subscribing witness would expose the will to little less danger of wrongful alteration and substitution than would exist if the devisee himself were allowed to become the witness; the same evil consequences would follow in the one case as in the other. If he may sign the name of one subscribing witness, he may sign the name of both, and in that way become a more potent factor in the execution and probate of the will than if he were allowed to become a subscribing witness himself. He may not, lawfully, take the matter so largely into his own hands. A proper construction of the statute excludes the devisee from

the doing of any act, even for the subscribing witness, which is essential to a valid subscription.

Again, though indention has always been the main reason for requiring subscribing witnesses in the execution of wills, Cochran was not asked to identify the paper propounded in this case as the one he claims to have witnessed for Margaret Simmons. Presumably, he could not have done so if asked. Indeed, he shows affirmatively that he could not. He made no inspection of the instrument to which he requested Dr. Leonard to sign his name; did not have sufficient eyesight to inspect it. Hence he could not afterward recognize it by its physical appearance. No name, mark, or sign did he impress upon it that subsequent recognition might be assured, or even rendered possible. Nor was he informed of its contents, so that he might thereby preserve its identity in his memory. Of course it was not essential that the witness should be informed of the provisions of the will: *Higdon's Will*, 6 J. J. Marsh. 444; 22 Am. Dec. 84; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424; *Ela v. Edwards*, 16 Gray, 92; *Tilden v. Tilden*, 13 Gray, 110; 1 Jarman on Wills, 213. Yet, if the information had been imparted, it might have served him as one means of future identification.

It was necessary, however, that something should occur, and that he should do some act (and that according to law), which, if remembered, would thereafter enable him to swear to the identity of the paper. If no such thing occurred, and no such act was done, then there was no valid subscription.

We do not hold that the fact of due subscription can be shown alone by the subscribing witness. On the contrary, it is well settled that such fact may be established by other persons, though his recollection fail him, or he become openly hostile to the will: *Rose v. Allen*, 1 Cold. 23; *Jones v. Arterburn*, 11 Humph. 98; *Alexander v. Beadle*, 7 Cold. 128; *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424.

But the proof of other persons will not suffice, unless it, in truth, shows that all formalities requisite to a valid subscription were observed. There is no such proof of other persons in this case.

Cochran states the whole transaction, so far as he had part in it, without lapse of memory or unfriendliness to the cause of proponent; and no one discloses any additional fact occurring at the time he is said to have subscribed the will.

Whether the paper propounded is the same he attempted to subscribe, or a different one, cannot possibly be determined from the completest narration of all that was then said and done. Speaking alone from the part he took in the matter, Dr. Leonard says it is the same. He recognizes his own handwriting in the name of the witness, and in that way, by something he did himself, and not by anything the witness did, is enabled to make the statement.

The necessity and use of his evidence for so important a purpose furnish a striking illustration of the correctness of our conclusion that Cochran's attempted subscription was inoperative in law, because his name was written by a devisee under the will.

Aside from the questions already discussed, it is by no means clear that the paper referred to by Cochran was ready for subscription when he was called upon to witness it. He does not know whether the testatrix had signed it or not. He did not see her signature, and no one told him it was on the paper.

Since it is the signature of the testator that subscribing witnesses are to attest, there can be no valid attestation or subscription, unless it be a fact that the testator has actually signed his name, or caused it to be signed, before they subscribe their names. There is no will to witness until it has been signed by the testator: *Chase v. Kittredge*, 11 Allen, 49; 87 Am. Dec. 687. See also *Reed v. Watson*, 27 Ind. 448; 1 Jarman on Wills, 253, 254; *Shaw v. Neville*, 33 Eng. L. & Eq. 615; *Lewis v. Lewis*, 11 N. Y. 220; *Ragland v. Huntingdon*, 1 Ired. 565; *Cox's Will*, 1 Jones, 324.

It is not essential that the testator sign his name in the presence of the subscribing witnesses, nor that they actually see his signature at all: *Ellis v. Smith*, 1 Ves. Jr. 11; 1 Randall and Talcott's Jarman on Wills, 212, 213; *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Ela v. Edwards*, 16 Gray, 92; *Tilden v. Tilden*, 13 Gray, 110.

The production of the will with his name signed to it, and in such a way that his signature may be seen by the witnesses, accompanied by a request of the testator that they witness it as his will, is a sufficient acknowledgment of the signature to render the will valid: *Id.*; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 432; 1 Jarman on Wills, 254.

In *Tilden v. Tilden*, 13 Gray, 110, the last of three subscribing witnesses neither saw the testator's signature nor heard

him make any allusion to it. Yet in that case it was held that the words, "I wish you to witness this," constituted a sufficient acknowledgment, when considered in connection with the fact that the testator, who used the expression, at the same time presented to the witness for attestation a paper which he had already signed as his will, and to which he had procured the names of two other witnesses, who did see his name before they signed their own names.

Giving the facts disclosed in this record the most favorable construction of which they are fairly susceptible, it may well be gravely doubted that the name of the alleged testatrix had been signed to the particular paper propounded at the time Cochran attempted to become a witness.

It is true, she is shown to have said to the witness that she desired him "to sign a will" for her; but she did not say anything about having already signed it herself, nor did she produce it then or afterward. After she made that request she seems to have done nothing, except acquiesce in the production of some paper from her bureau by another person, and its presentment by him to the witness for the latter's name, — that other person being the principal beneficiary, and the supposed testatrix being old and illiterate.

Though allowed the same weight in this court as the verdict of a jury (*Eller v. Richardson*, 89 Tenn. 575), the finding of the trial judge on the main question in this case is without legal support. That the contested paper was duly executed as the will of Margaret Simmons is not established by sufficient competent proof. Ordinarily, the testimony of one witness is entirely sufficient to sustain the finding of the court or verdict of a jury upon an issue of fact; but that rule is not controlling in a case like this, where the law requires two witnesses to make out the matter in issue.

The statute requires two competent subscribing witnesses in every devise of land, and nothing less than that will justify a judgment in favor of the will. The law prescribes the *quantum* of proof requisite in such a case; and neither the jury, nor court sitting as a jury, is allowed to find in favor of the will on less evidence than that prescribed.

There is no dispute as to the facts with reference to Cochran's attempted subscription. Whether, under those facts, he was a competent subscribing witness is a question of law. We think he clearly was not. Then, in legal contemplation,

there was but one subscribing witness, and the judgment in favor of the will was necessarily erroneous

Reverse, and enter judgment here.

WILLS. — ATTESTATION, WHAT SUFFICIENT: See notes to *Coffin v. Coffin*, 80 Am. Dec. 242; *Will of Meurer*, 28 Am. Rep. 595-598. A will need not be read by or to the subscribing witnesses, nor is it necessary that they should know its contents: *Higdon's Will*, 6 J. J. Marsh. 444; 22 Am. Dec. 84. Where a testator acknowledges his signature to a will in the presence of the witness, it is equivalent to signing in his presence: *Burwell v. Corbin*, 1 Rand. 181; 10 Am. Dec. 494. Witnesses to a will need not attest it in the presence of each other: *Johnson v. Johnson*, 106 Ind. 475; 55 Am. Rep. 762; *Dewey v. Dewey*, 1 Met. 349; 35 Am. Dec. 367; *Helbeck v. Granberry*, 2 Hayw. 332; 2 Am. Dec. 624. It is sufficient that they, at different times, in the presence of the testator, and at his request, sign their names as subscribing witnesses: *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424; *Webb v. Fleming*, 30 Ga. 808; 76 Am. Dec. 675.

WITNESSES — COMPETENCY. — The word "credible," in the statute of wills, means "competent"; that is, such persons as are not legally disqualified from testifying in courts of justice by reason of mental incapacity, interest, or the commission of crime, or other cause excluding them from testifying generally, or rendering them incompetent in respect to the particular subject-matter or the particular suit: *In re Will of Noble*, 124 Ill. 266. Compare *Hawes v. Humphrey*, 9 Pick. 350; 20 Am. Dec. 481. In the latter case, and also in *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666, it was ruled that the witness is not competent unless competent at the time of the attestation. The inhabitants of an incorporated society, to whom property is devised for the support of a school, are competent witnesses to attest the will: *Cornwell v. Isham*, 1 Day, 35; 2 Am. Dec. 50; nor is a witness disqualified because he resides in a portion of a town to which the testator bequeathed certain property, through the medium of trustees, after a life estate in the testator's wife: *Hawes v. Humphrey*, 9 Pick. 350; 20 Am. Dec. 481. A wife is not a competent witness to her husband's will: *Pease v. Allis*, 110 Mass. 157; 14 Am. Rep. 591; nor to a will containing a devise to her husband: *Sullivan v. Sullivan*, 106 Mass. 474; 8 Am. Rep. 356. But an executor acting as such, and having no beneficial interest under the will, is a competent witness: *Comstock v. Hadlyme Ecc. Society*, 8 Conn. 254; 20 Am. Dec. 100; *Meyer v. Fogg*, 7 Fla. 292; 68 Am. Dec. 441; *Stewart v. Harriman*, 56 N. H. 25; 22 Am. Rep. 408.

WILLS — SUBSCRIPTION BY WITNESSES, WHAT SUFFICIENT. — If subscribing witnesses are unable to write, the writing of their names by others, marks being attached by themselves, will be a sufficient subscription: *Montgomery v. Perkins*, 2 Met. (Ky.) 448; 74 Am. Dec. 419; *Lord v. Lord*, 58 N. H. 7; 42 Am. Rep. 565; *Jesse v. Parker*, 6 Gratt. 57; 52 Am. Dec. 102.

WILLS — SUFFICIENCY OF EXECUTION. — In *Brooks v. Woodson*, 87 Ga. 379, following *Duffie v. Corridon*, 40 Ga. 122, it was laid down that the witnesses to a will must subscribe their names as witnesses after the will is signed by the testator, there being nothing to attest until his signature has been annexed. The testator must either sign the will in the presence of both witnesses, or acknowledge his signature in their presence: *Rutherford v. Rutherford*, 1 Denio, 33; 43 Am. Dec. 644. But it is sufficient that he

acknowledge his signature and request them to attest as witnesses: *Webb v. Fleming*, 30 Ga. 808; 76 Am. Dec. 675; *Jauncey v. Thorne*, 2 Barb. Ch. 40; 45 Am. Dec. 424. In *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367, it was held that the witnesses need not see the testator's name after he has written it. On the other hand, in the case of *In re Mackay*, 110 N. Y. 611, 6 Am. St. Rep. 409, the rule was stated to be, that the subscribing witnesses to a will must see the testator's signature at the time when they attest it.

ROACH v. WOODALL.

[91 TENNESSEE, 206.]

NEGOTIABLE INSTRUMENTS. — ONE IS A HOLDER OF A NOTE FOR VALUE IN DUE COURSE OF TRADE if he takes it as a consideration for his indorsement of another note.

NEGOTIABLE INSTRUMENTS. — IF AN INDORSEMENT IS FORGED BY ONE LAWFULLY IN POSSESSION of a note, which cannot be transferred without indorsement, and he transfers it, so indorsed, to an innocent purchaser for value, the latter does not acquire any title thereto.

Matthew W. Allen, and Stokes and Stokes, for the plaintiff.

Champion, Head, and Brown, for the defendant.

SNODGRASS, J. Isaac Whitworth sold to J. B. and William Hartman a tract of land, taking in part consideration therefor the following note, payable to his minor son: —

“January 21, 1878.

“Thirteen years after date, we promise to pay to the order of Milton J. Whitworth five hundred dollars, being fourth payment for a tract of land. Value received.

“JOHN B. HARTMAN.

“WILLIAM HARTMAN.”

The note subsequently came into the possession of defendant Woodall, as guardian of the minor payee.

Woodall delivered the note to defendant W. I. Cherry in 1889, and before it was due, as collateral security for Cherry's indorsement of Woodall's note in bank for five hundred dollars, which last note defendant Cherry subsequently paid as indorser.

At the time the note in controversy was delivered, it had indorsed upon it the name of Milton J. Whitworth, the payee. Cherry did not know Whitworth, or that he was a minor at the time, nor that Woodall was his guardian. Woodall did not transfer as guardian, or pretend to do so. He claimed to be a purchaser of the note from Whitworth, and to own the

note, and under this claim delivered it, thus indorsed, to Cherry.

The indorsement was a forgery; and after the death of Milton J. Whitworth, who died before he became of age, S. H. Roach administered upon his estate, and filed this bill to recover of defendant Cherry the note, and to collect it of the defendants Hartman.

Cherry defended, upon the ground that he was an innocent purchaser for valuable consideration, and without notice. The chancellor decreed in favor of complainant, and Cherry appealed.

Assuming that Cherry took the note as consideration for his indorsement of Woodall's note at the time or before the delivery of the Whitworth note to him, he would be a holder for value and in due course of trade: *Nichol v. Bate*, 10 Yerg. 429.

A different result would follow if received after he had incurred the liability, and took it merely as security for a pre-existing debt: *Craighead v. Wells*, 8 Baxt. 38; 35 Am. Rep. 685.

The complainant insists that the testimony of Mr. Cherry is not sufficiently specific to show that he in fact received the note in consideration of the indorsement; but that all he says may be taken as true, and yet it may have been delivered to him to secure him after he had incurred this liability.

Waiving this question, and for the purposes of this opinion treating his evidence as affirmative,—that the indorsement was made upon this consideration,—we consider the effect of the delivery to Cherry of this note with the forged indorsement of the payee, leaving for the time out of view the fact that the supposed indorser was a minor. Does such a holder obtain title to the note? and can he defeat the true owner, the payee, or his representative, who seeks to recover it from him? It is assumed in argument of defendants' counsel that this proposition was decided in the affirmative by our predecessors in this court in 1878: *Duke v. Hall*, 9 Baxt. 282.

As stated in the opinion of the court in that case, the note in controversy was one made by A. D. Hurt, payable to Allen Deberry, and by him "indorsed to J. W. Glass." This note, without indorsement by J. W. Glass, was placed by him in the safe of J. E. Glass. The latter, without authority, indorsed the name of J. W. Glass upon it, and transferred it to an innocent purchaser or holder for value. This holder transferred

to another. The suit was by the assignee of J. W. Glass, the real owner, against the last purchaser, and it was held that he was not entitled to recover. The statement in the opinion is, that the note was "indorsed by the payee to J. W. Glass." Whether it is meant that this indorsement was in terms to him, or whether it was indorsed in blank and delivered to him, is not clear; but treating the language quoted as showing that it was not indorsed in blank, but to J. W. Glass by name, it put the title in him, and required his indorsement to pass it out of him, and this is elsewhere assumed in the opinion. Still, it is not the exact case presented here, because there the note was first properly indorsed by the payee to another, while here there never was any indorsement put upon it by the payee. But regarding that indorsement as to J. W. Glass by name, as it purports fairly to have been, in the language of the opinion, there is no difference in principle in that case and this, because there, as here, it was payable to a particular person or his order, — in that case by indorsement, in this, on its face, — and if that case is correctly decided, it is conclusive of this. In that case, Judge Freeman, delivering the opinion, quoted from Kent the principle assumed to authorize it, as follows: "The *bona fide* holder can recover on the paper, and gets a good title to it, though it come to him from a party who had stolen or robbed it from the true owner, provided he took it innocently, in the due course of trade, for a valuable consideration not overdue, and under circumstances of due caution, and he need not account for his possession unless suspicion is raised": 3 Kent's Com. 78, 79.

The quotation was a very clear and accurate statement of the law as recognized generally by text-writers and courts where it applies; but it was not made by the author in reference to paper stolen from the payee before indorsement by him, or to paper which required indorsement to be made before title could be passed, and which was subsequently forged, but related to negotiable paper payable to bearer, or indorsed in blank before stolen, and thus made payable to bearer, in which case the thief had nothing to do but deliver the paper, with or without further indorsement, to a *bona fide* purchaser, as the preceding part of the paragraph (not quoted by Judge Freeman) clearly shows. That part was as follows: "Possession is *prima facie* evidence of property in negotiable paper payable to bearer or indorsed in blank; and the bearer, though a mere agent, or the original payee, when the indorsement is

in blank, may sue on it in his own name without showing title, unless circumstances appear creating suspicion."

When Mr. Kent adds, "the *bona fide* holder can recover upon the paper," the reference is to such paper,—that is, to paper transferable by delivery, payable to bearer, or having upon it a valid indorsement in blank when stolen,—and it is only to such paper that the rule applies, under all the authorities. The distinction is very clear between the transfer of such paper and the attempt to transfer paper stolen or obtained without authority, not payable to bearer or indorsed in blank when stolen or so obtained. In the latter case no title can be passed to an indorsee or transferred by reason of a forged indorsement, as against the party whose indorsement is forged: Daniel on Negotiable Instruments, secs. 677, 1354, 1469; 2 Parsons on Notes and Bills, 284; Story on Promissory Notes, secs. 381–383.

Authorities on this point need not be multiplied in citation,—there are none to the contrary. The distinction was overlooked in the case of *Duke v. Hall*, 9 Baxt. 282, and the holding on this point in that case was not the law, and to that extent it is overruled.

Another question decided by the chancellor was, that the indorsement might be avoided by complainant, and the note recovered because of the minority of the payee, the supposed indorser.

Under the decisions in this state and others, the indorsement might well have been held to be void.

Mr. Story, in his work on promissory notes, sections 77–80, puts upon the same ground the minor's incapacity to indorse and make a promissory note, and shows that there is a conflict of opinion as to whether such act is void or voidable.

The court of this state has ranged itself with those holding the making of a negotiable note by a minor, even for necessities, a void act, and this, after full discussion, upon the weight of authority: *McMinn v. Richmonds*, 6 Yerg. 9.

Mr. Story thought the weight of authority preponderated in favor of holding promissory notes given or indorsed by an infant voidable only: Story on Promissory Notes, sec. 78. But, treating it from this stand-point, he declares the law to be well settled that not only may the infant avoid it and intercept payment to the indorsee, but by giving notice to the antecedent parties of his avoidance, furnish to them a valid defense against the claim of the indorsee: Sec. 80.

It would seem clear, then, that whether such indorsement were void or voidable, the minor or his representative might avoid it and recover the note of the transferee, and that this is not only a well-settled but a just rule of law; for a transferee who receives by delivery merely from bearer a note with the name of another indorsed upon it, ought to be charged with notice who that indorser was, and whether a person who could in law bind himself by an indorsement. If he does not in fact know the indorser, he would hardly predicate anything of an indorsement, or rely on it without inquiry. Such inquiry would disclose the minority of the indorser, and, consequently, it might well be holden that the transferee was chargeable with notice of the invalidity of the indorsement.

But as the minor did not in fact indorse the note in controversy, these questions do not necessarily arise, or call for decision, and we therefore rest the decision upon the ground already stated,—the invalidity of the transferee's title under the forged indorsement.

The decree is affirmed, with cost.

CONTRACTS — CONSIDERATION, SUFFICIENCY OF. — A consideration is good which involves either benefit to promisor or detriment to promisee: *New Hanover Bank v. Bridgers*, 98 N. C. 67; 2 Am. St. Rep. 317. Promise to pay upon performance of an act by which promisee is benefited becomes binding when act is performed: *Hilton v. Southwick*, 17 Me. 303; 35 Am. Dec. 253.

NEGOTIABLE INSTRUMENTS — RIGHTS OF HOLDERS. — Forged indorsement of negotiable bill passes no title to it, even to innocent indorsee, and no holder can recover amount of it from drawers without alleging and proving payee's indorsement: *Foltier v. Schroder*, 19 La. Ann. 17; 92 Am. Dec. 521.

LOCHEIMER v. STEWART.

[91 TENNESSEE, 385.]

BANKRUPTCY. — JUDGMENT OBTAINED PENDING PROCEEDINGS IN BANKRUPTCY upon a debt provable therein is barred by the subsequent discharge of the judgment debtor in such bankruptcy proceedings.

John L. H. Tomlin and M. B. Gilmore, for the plaintiff.

W. M. McCall and E. L. Bullock, for the defendant.

SNODGRASS, J. The question in this case is, whether a discharge in bankruptcy can be plead in bar of a suit upon a judgment obtained in a state court on a claim provable in

bankruptcy before the discharge, but after commencement of bankrupt proceedings.

The petition in bankruptcy was filed in 1878, but the discharges of defendants, Stewart and Oliver, were not obtained until 1887-88.

In the mean while, on April 30, 1881, Locheimer Brothers, creditors of the firm of Stewart and Oliver when bankrupt proceedings were instituted, had taken judgment on their claim (which was one provable in bankruptcy) before a justice of the peace.

They brought this suit on that judgment April 27, 1891, before a justice of the peace, lost, and appealed to the circuit court. The circuit judge sustained the plea, and rendered judgment in favor of defendants, and plaintiffs appealed in error.

The judgment is correct. It is in accordance with the holding of this court in a case arising under the bankrupt law of 1841: *Dick v. Powell*, 2 Swan, 632; and with the persuasive view taken by Judge Cooper, on full consideration of authorities, after the bankrupt act of 1867: *Stratton v. Perry*, 2 Tenn. Ch. 633.

The application, correctness, and authority of these cases are earnestly contested by plaintiffs, but the question has been conclusively settled as then held by the supreme court of the United States: *Boydton v. Ball*, 121 U. S. 457. In that case, taking jurisdiction of it as a federal question, the supreme court so decided, reversing the judgment of the supreme court of Illinois to the contrary.

We concur in the opinion expressed by the supreme court of the United States on the merits of the question; but if we did not, we would be constrained to follow it, as that court exercises in this class of cases a revisory jurisdiction.

Let the judgment be affirmed, with costs.

BANKRUPTCY. — JUDGMENT OBTAINED PENDING PROCEEDINGS IN BANKRUPTCY: See notes to *Morrill v. Morrill*, 23 Am. St. Rep. 112; *Olark v. Rowling*, 53 Am. Dec. 296-301; *Bowen v. Eichel*, 46 Am. Rep. 577-580. Such a judgment is not a nullity; and unless it is stayed upon the application of the judgment debtor, an execution sale thereunder is valid: *Lackey v. Steere*, 121 Ill. 598; 2 Am. St. Rep. 135. It will be vacated upon a bill filed in equity to enforce it, if defendant has had no prior opportunity to avail himself of defense in bankruptcy: *McDonald v. Ingraham*, 30 Miss. 389; 64 Am. Dec. 166.

RAILROAD v. BARNHILL.

[91 TENNESSEE, 395.]

CORPORATIONS, RESIDENCE OF. — If different charters are granted for the same general business by different states to the same corporation, and an organization is properly effected under each charter, the corporation becomes a citizen of each state, and, as such, has the protection of and is amenable to its laws.

CONFLICT OF LAWS. — **GARNISHMENT OF INDEBTEDNESS ARISING IN ANOTHER STATE** under a contract made there between a citizen thereof and a corporation may be effected by service of process in this state, if such corporation is also chartered in this state and here carries on business, though the person to whom the debt is due remains a non-resident.

GARNISHMENT OF WAGES DUE FROM A CORPORATION CHARTERED IN TWO OR MORE STATES may be effected in each state, though such wages are due to a non-resident for services rendered in another state.

J. M. Boone, for the railroad.

J. T. Barnhill, and Stovall and Herring, for Barnhill.

CALDWELL, J. This is a garnishment proceeding, by which J. T. Barnhill seeks to recover from the Mobile and Ohio Railroad Company, as garnishee, the sum of \$50.60, due from it to his debtor, J. J. Joyner.

The circuit judge tried the case on an "agreed statement of facts," and rendered judgment in favor of Barnhill. The railroad company appealed in error.

In its answer, the railroad company admits that it is indebted to Joyner in the sum of \$52.60, but denies that it is subject to garnishment in the state of Tennessee for that indebtedness.

The facts upon which the defense is made are as follows: That the Mobile and Ohio Railroad Company was chartered originally by the state of Alabama, then by the state of Mississippi, and then by the state of Tennessee; that the indebtedness of the company "to Joyner is for labor performed wholly within the state of Mississippi," and under contract made in that state, and that he is a citizen of that state.

Barnhill is a resident of Tennessee, and the garnishment process, which is in due form, was regularly served on the station agent of the railroad company at Ramer, in McNairy County, this state.

From these facts the argument is made, that the railroad company, as well as Joyner, is a non-resident of Tennessee, and a resident of Mississippi, as to the subject-matter of this litigation, and that therefore the courts of this state have no

jurisdiction to render judgment against it for the debt in question.

It is true, as a general rule, that a non-resident cannot be charged as garnishee; but it is not true that the railroad company is to be treated in this case as a non-resident. In reality it is not a non-resident, but a resident of Tennessee. It exists and performs its functions within our territorial limits as a domestic corporation by virtue of a charter granted by the legislature of this state: Acts 1847-48, c. 118.

That the same incorporators obtained earlier charters from the states of Alabama and Mississippi, and effected an organization and still do business thereunder, does not render the corporation any less a resident of Tennessee.

It is well settled that a corporation created and organized under the laws of a particular state has its legal residence in that state, and that it cannot change its citizenship by doing business in another state: *Baltimore etc. R. R. Co. v. Koontz*, 104 U. S. 5.

“It must dwell in the place of its creation, and cannot migrate to another sovereignty”: *Bank of Augusta v. Earle*, 13 Pet. 520.

Yet different charters for the same general business may be granted by different states to the same incorporators; and when that is done, and organization is properly effected under each charter in succession, the corporation becomes a citizen of each state, and, as such, has the protection of and is amenable to her laws: *Memphis etc. R. R. Co. v. Alabama*, 107 U. S. 581.

The fact that the indebtedness of the railroad company to Joyner arose in Mississippi under a contract made in that state does not render the railroad company a non-resident of Tennessee as to that indebtedness. The contention to the contrary, and that the railroad company is a non-resident of this state as to that debt, is not sustained by the case of *Memphis etc. R. R. Co. v. Alabama*, 107 U. S. 581.

The decision in that case was, that the railroad company was a citizen of both Tennessee and Alabama, having been chartered in each state; and that, being a citizen of Alabama, it could not, upon the ground of citizenship in Tennessee, remove into the circuit court of the United States a suit brought against it in a state court of Alabama by another citizen of Alabama.

It was not there decided, as here contended, that, for the

purposes of that litigation, the corporation was to be treated as not a citizen of Tennessee, because the matters involved arose in Alabama. The ground of that decision was corporate citizenship in Alabama, the court holding that the corporation was a citizen of that state, as well as of Tennessee, where it obtained its first charter.

The Mobile and Ohio Railroad Company, as already stated, was chartered and is doing business in Alabama, Mississippi, and Tennessee. It is therefore in fact and in law a citizen of each of these states.

Whether the debt here involved was created in this state or in the state of Mississippi, is a question which cannot affect the citizenship of the corporation in Tennessee, or the jurisdiction of the courts of this state to render proper judgment against it as garnishee in this case.

Nor does the non-residence of Joyner, the creditor of the railroad company and debtor of plaintiff below, defeat or preclude the jurisdiction of our courts. Clearly, Joyner himself could have come into Tennessee and maintained his suit here against the railroad company for its indebtedness to him. He could have obtained jurisdiction of the corporation by service of process upon its proper officer or agent in this state: Code, secs. 2831 et seq. That being so, it would seem to follow that his creditor can, by service upon the same person, bring the corporation before the court, and there have the same question of liability adjudged.

Even as against a foreign corporation doing a regular business in this state, the present proceeding would be within the rules of procedure laid down in a recent work of high standing. The language of the work referred to is as follows: "The question of the liability of foreign corporations to garnishment differs little from that of natural persons domiciled in another jurisdiction, in so far as the course of business of certain classes of corporations has occasioned the enactment of special statutes in most of the states giving courts jurisdiction of such bodies when engaged in the prosecution of their business in states other than that of their residence. Except, therefore, in those states where it is held that corporations are in no event subject to garnishment, a foreign corporation may be charged as garnishee in all cases where an original action might be maintained against it for the recovery of the property or credit in respect to which the garnishment is served.

In some of the states this rule obtains through the construction of statutes *pari materia*, and in others by express provision. Generally, the jurisdiction of the court in such cases is based upon a statute providing for the commencement of suits against foreign corporations when engaged in doing business within the state, by service upon some officer or agent of the company resident there, or that may be found within the jurisdiction": 8 Am. & Eng. Ency. of Law, 1131, 1132.

In this state there is just such a statute as that referred to in the last sentence above: Code, secs. 2831-2834 a, inclusive. It comprehends both domestic and foreign corporations: *Railroad Co. v. Walker*, 9 Lea, 480; *Holland v. Mobile etc. R. R. Co.*, 16 Lea, 418.

In any and every aspect of the case at bar, the plaintiff in error is subject to be charged as garnishee.

The same question, upon very similar facts, came before this court in *Holland v. Mobile etc. R. R. Co.*, 16 Lea, 414. The conclusion reached in that case was the same as that reached in this. A mere citation of that case would have been sufficient for the purposes of this one, but for the fact that counsel has questioned the soundness of the decision there made, and asked to have the question re-examined.

Believing it to be entirely sound, we adhere to the ruling made in that case. In the conclusion of the opinion, the court, speaking through Judge Cooper, said: "All of the authorities agree, therefore, that in the case of a railroad corporation chartered by two or more states, the corporation may be garnished in each state for wages due by it to its employees: Drake on Attachments, sec. 879; 1 Rorer on Railroads, sec. 720": *Holland v. Mobile etc. R. R. Co.*, 16 Lea, 418.

Affirmed, with costs.

CORPORATIONS, RESIDENCE OF. — Corporation created by and transacting business in state is to be deemed an inhabitant of such state, capable of being treated as a citizen for all purposes of suing and being sued: *Clark v. Bank of Mississippi*, 10 Ark. 516; 52 Am. Dec. 248; *Baltimore etc. R. R. Co. v. Glenn*, 23 Md. 287; 92 Am. Dec. 688. Corporation chartered by two states, by same name and style, clothed with same powers, and intended to accomplish same objects, fulfilling same duties in both states, is a distinct and separate body in each state: *Allegheny County v. Cleveland etc. R. R. Co.*, 51 Pa. St. 228; 88 Am. Dec. 579.

GARNISHMENT OF RESIDENT DEBTORS OF NON-RESIDENTS. — A resident indebted to a non-resident may be garnished in the courts of the state of the former's residence: *Berry v. Davis*, 77 Tex. 191; 19 Am. St. Rep. 748, and note. Foreign corporation doing business in the state may be garnished for

debt due to non-resident employee, contracted outside the state and exempt from garnishment in state where defendant and garnishee reside: *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497.

IRVINE v. PALMER.

[91 TENNESSEE, 462.]

WILLS. — A LEGACY IS SUBJECT TO AN EQUITABLE LIEN OR RIGHT OF SET-OFF in favor of the estate of the testator for all debts owing from the legatee to the testator at the time of the latter's death, and such lien or right of set-off is paramount to any lien or right which can be acquired by any assignee or creditor of the legatee.

EXECUTORS AND LEGATEES. — IF A LEGATEE IS INDEBTED TO THE TESTATOR, the executor may retain the legacy either in part or full payment of the debt, by way of set-off.

Cooper and Harwood, for Irvine.

Neil and Deason, and *R. P. Raines*, for Palmer.

LEA, J. Complainant filed his bill in this case on January 3, 1887, against W. R. Palmer, Mrs. Jane James, and T. J. Warren, administrator of J. W. Hays. He charges that he had recovered, in 1883, a judgment for \$1,631.73, and costs, against defendant Palmer, and that said judgment was still unsatisfied, and execution had been returned *nulla bona*; that in December, 1886, J. W. Hays died testate; that his will had been duly proven, and that on January 1, 1887, defendant T. J. Warren qualified as administrator of said Hays, with the will annexed; that by the terms of said will, defendant Palmer is made a legatee, and will perhaps receive enough money to pay the debt due complainant; that testator directs a sale of his real estate, and that the same be converted into money and divided between certain of his relations, one of whom is defendant Palmer. He prays for injunction, etc., and that such decrees be rendered as will subject Palmer's interest in J. W. Hays's estate to the payment of his debt and costs.

Palmer answered, and by written agreement admitted his indebtedness to complainant, and agreeing that his interest in the estate was liable for its payment.

Warren, administrator, answered, admitting that Palmer was a residuary legatee under the will of J. W. Hays, but set up in his answer, as a defense to complainant's right of recovery, that at the time of the death of J. W. Hays, defendant Palmer was indebted to him by account, and that, subse-

quently, upon a settlement with defendant Warren, he had executed his note to him, as administrator, for \$454.72, and insists that said debt is a prior charge upon the legacy of said Palmer to the claim of complainant, and if there is a residue of the estate, that he has a right "to retain the same, or enough of the same, to liquidate and pay off said debt due the estate of J. W. Hays, and his right to do this is in no way affected by the attachment of complainant." There is no issue or controversy as to facts; the only issue is as to priority of payment. Complainant insists that he is entitled to such priority under the facts stated, having fixed a lien thereon; and defendant Warren insists he is first entitled to retain enough of said legacy to pay what the legatee owes the estate.

Upon this issue the chancellor decreed that defendant Warren, administrator, has the right and should retain out of said legacy of Palmer a sufficient amount to pay his note and interest before complainant can receive anything on his debt out of said legacy; that defendant Warren, administrator, has priority over complainant. From this decree complainant has appealed. The decree of the chancellor is correct. The right of retainer for a debt due the estate from a legatee is an equitable doctrine which has received the support and sanction of courts of equity from the earliest cases. The right to retain is grounded upon the principle that it would be inequitable that a legatee should be entitled to his legacy while he retains in his possession a part of the funds out of which his and other legacies are to be paid. He should not receive anything out of such a fund without deducting therefrom the amount of that fund which he has in his hands as a debt to the estate. An assignee of the legatee takes his legacy subject to the same equity which exists against it in his hands. This equitable principle and doctrine is approved by all the leading text-writers. In 2 Redfield on Wills, 581, it is stated: "There seems to be no question of the right and duty of the executor to set off any debt due the estate from a legatee against any legacy which he may be called on to pay. But this right of retainer does not extend to an indebtedness created after the decease of the testator, by the legatee giving security to the estate for the indebtedness of other parties. It has been held that the executor's right to retain upon debts due the estate, as against legatees, is prior to any right of a mortgagee of the legacy."

1 Pomeroy's Eq. Jur., sec. 541, it is stated: "In fact,

such a legacy produces no effect upon the indebtedness. The only effect which such a legacy given *simpliciter* can have is to create the right to an equitable set-off. The legatee might not be forced, by means of a legal action, to pay the debt to the executors, when he could in turn recover back from them the same amount, or a part thereof, by virtue of his legacy. A court of equity, in order to prevent this circuitry of action, may permit the executor to set off the debt against the demand made on them for the legacy; and if the estate is solvent, so that the debtor will be entitled to receive payment of his legacy, the court may compel the executors to give him credit for the amount of the legacy, when they are seeking to enforce the claim of the estate upon him for the debt."

It is said in Williams on Executors: "Where a legatee is indebted to the testator, the executor may retain the legacy, either in part or full satisfaction of the debt, by way of set-off": 2 Williams on Executors, 1119. So also Adams's Equity, 223.

But it is insisted for complainant that a contrary rule prevails in this state; and we are referred to the cases of *Towles v. Towles*, 1 Head, 601, *Mann v. Mann*, 12 Heisk. 246, and *Steele v. Frierson*, 85 Tenn. 436, as sustaining complainant's contention. The case of *Towles v. Towles*, 1 Head, 601, was the sale by an heir of his interest in land, and the administrator afterward sought to collect out of the land a debt due from the heir to the estate. The court said, if the sale was *bona fide*, it would hold against the debt of the estate. In *Mann v. Mann*, 12 Heisk. 246, it appeared that a son was indebted to his father's estate, and was insolvent. His interest in his father's estate was attached, upon his father's death, by some of the creditors for their debts. The administrator sought to have the indebtedness from the son to the estate of the father given priority over the attaching creditors. The court held: "The son's indebtedness to his father's estate is not a lien on the son's share in the father's realty, which share is therefore subject to a race of diligence between the personal representative of the father and the other creditors of the son." *Steele v. Frierson*, 85 Tenn. 436, was where there was an assignment by a son, before his father's death, of his interest in his father's estate, his interest being real and personal. But whether there was involved in the controversy before the court any personalty does not very clearly appear. The cases referred to in the opinion as sustaining the position

assumed were cases involving realty alone. But be this as it may, the parties were content not to raise or present the question of retainer; nor was the same argued before or passed upon by the court. The cases do not sustain the contention of the complainant. Neither of the cases was a contest between the legatee and an executor, but were cases of realty which, upon the father's death, descended directly to the heir, and a lien had to be fixed either by attachment or assignment. In this case, it is a legacy in the hands of the administrator *cum testamento annexo*.

The decree will be affirmed, with costs.

WILLS — DEDUCTIONS AND CHARGES AGAINST DISTRIBUTOR. — When an heir owed the intestate at the time of his death, the amount of the debt should be deducted from such heir's share in the distribution of the estate: *Batton v. Allen*, 5 N. J. Eq. 99; 43 Am. Dec. 630. As to the effect of bequeathing a legacy to a debtor, see *Rickets v. Livingstone*, 2 Johns. Cas. 97; 1 Am. Dec. 158; *Zeigler v. Eckert*, 6 Pa. St. 13; 47 Am. Dec. 428; *Cole v. Covington*, 86 N. C. 295; 41 Am. Rep. 458.

RAILROAD v. SADLER.

[91 TENNESSEE, 508.]

RAILROAD CORPORATIONS — LIABILITY OF, FOR KILLING STOCK. — If stock, from being frightened by a moving train, run upon a trestle, from which they fall, and are thereby killed, the railroad corporation is not liable therefor under a statute imposing liability for stock, the killing or crippling of which is caused by any moving train, or engine, or cars.

CHAPTER 101 of the statute of Tennessee for the year 1891, the construction of which is involved in the following opinion, declares, in its first section, "that whenever any stock may be killed or crippled by any train of cars or locomotive upon an unfenced railway within the state, it shall be the duty of the section-master to notify the owner of such stock"; and in section 2, "that any person, company, or corporation, or lessee or agent thereof, owning or operating any railroad within the state of Tennessee shall be liable for the value of any horse, cow, or other stock killed, whenever such killing or injury is caused by any moving train, or engine, or cars upon such track."

Joseph E. Jones, for the plaintiff.

Charles M. Ewing, for the defendant.

LURTON, J. The act of 1891, chapter 101, making unfenced railroads absolutely liable for all stock killed or injured on or near their tracks applies only to injuries resulting from actual collision with a moving engine or car. The language of the act forbids any other construction. The injury must be the direct result of contact with "moving trains, cars, or engine." This construction had been given to the old law: *Milliken and Ventrees's Code*, secs. 1298-1300; *Holder v. Chicago etc. R. R. Co.*, 11 Lea, 176.

The later act is no more explicit on this point than the former. Similar acts in other states have been uniformly construed as applicable only to cases of injury from direct collision. Numerous cases are cited to this effect in 7 Am. & Eng. Ency. of Law, 928. To the same effect are the following: *Burlington etc. R. R. Co. v. Shoemaker*, 18 Neb. 369; *Holder v. Chicago etc. R. R. Co.*, 11 Lea, 176; *Croy v. Louisville etc. R'y Co.*, 97 Ind. 126; *Knight v. New York etc. R. R. Co.* (an opinion of the court of appeals of New York), 99 N. Y. 25; *International etc. R. R. Co. v. Hughes*, 68 Tex. 290; *Jeffersonville etc. R. R. Co. v. Dunlap*, 112 Ind. 93.

In these cases the animals seem, from fright, to have run ahead of the moving train, and onto a trestle, from which they fell, not being touched by the moving train.

The charge was erroneous upon this point, and for this error both cases must be reversed.

RAILROAD COMPANIES—LIABILITY FOR KILLING STOCK.—A railroad company is not liable, under the Indiana statute of 1853, for injury to stock resulting from fright at the cars, where the injured animals had not been touched by any car, locomotive, or other carriage belonging to the company: *Peru etc. R. R. Co. v. Hasket*, 10 Ind. 409; 71 Am. Dec. 335, and note citing other cases decided in the same state. The liability of railroad companies for killing stock is discussed generally in the extended notes to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 261-273; *James v. Salem etc. R. R. Co.*, 96 Am. Dec. 681, 682; *Savannah etc. R'y Co. v. Geiger*, 58 Am. Rep. 706-707.

COLE MANUFACTURING COMPANY v. COLLIER.

[91 TENNESSEE, 525.]

ARBITRATION — SUBMISSION TO, WHEN NOT A CONDITION PRECEDENT TO RIGHT OF ACTION. — If a contract for the erection of a building declares that in case any difference should arise between the parties as to the quality of work or materials, or as to any other question, the same shall be settled by arbitration, the contractor may nevertheless maintain an action under the contract, without first submitting, or offering to submit, to arbitration. The breach of the stipulation to submit to arbitration cannot be pleaded in bar to an action on the principal contract, unless it expressly or by necessary implication makes the submission a condition precedent to the maintenance of any suit.

INTEREST. — THE ALLOWANCE OF INTEREST on an amount due upon a contract rests within the sound discretion of the chancellor, in Tennessee, and the supreme court, on appeal, will not interfere.

Myers and Sneed, for the plaintiff.

W. M. Smith, Casey Young, and Gantt and Patterson, for the defendant.

L. LEHMAN, S. J. The bill in this cause was preferred by the complainant, a corporation, to recover from the defendant, W. A. Collier, the price and value of labor and material performed and furnished in the construction of a building, under a written agreement entered into between them on November 14, 1889, the portion of which applicable to the question raised is as follows: "It is further agreed that in case any difference should arise between the said Collier and the Cole Manufacturing Company as to the quality of work or materials, or any other question that may arise under this contract, the same shall be settled by arbitration, each party selecting a good man; and in the event of their disagreeing, these two shall select a third party, and their decision shall be final. In consideration of the above, said Collier is to pay the said Cole Manufacturing Company nine thousand dollars (\$9,000), more or less, as the amount may be, which amount the said Collier will secure by deed of trust on nine acres of land in the Kinnay Heistand subdivision of land; said trust deed to be drawn at once, and held by E. C. Jones until said building is finished, when he will deliver the same to Mr. W. I. Cole."

W. I. Cole was the president of complainant company.

The bill further alleges the execution of the said trust deed and delivery of it to E. C. Jones; and the complainant therein also prayed that the said Jones, who is a defendant in the

cause, and Collier be decreed to deliver up said trust deed, and also asked for the enforcement of the same to satisfy the amount owing by W. A. Collier to the complainant.

The bill contains averments of various demands made for the delivery of the trust deed, and a request on the part of the defendant, W. A. Collier, to have a submission and arbitration of the claims of the plaintiff because of his dissatisfaction, stated in a general way, with the work done and materials furnished by the complainant, and which request, it is averred, was made, after considerable delay, subsequent to the completion of the building. The latter allegations are made in the bill in order to excuse the refusal of the complainant to submit the matters to arbitration.

The defendant, W. A. Collier, demurred to the bill, assigning, as ground therefor, the failure and refusal of the complainant to arbitrate differences under the provisions of the written agreement of November 14, 1889. Such demurrer was overruled by the chancellor, and thereupon the defendant, W. A. Collier, filed his answer and cross-bill, in which he denied that the complainant had complied with said contract, and for cross-action set up, in a general way, without stating the amount thereof, damages accruing to him by reason of the complainant's failure to comply with its contract, and arising from its failure to comply with its agreement to arbitrate.

The complainant made no objection to this cross-bill, by demurrer or otherwise, but answered the same.

The chancellor rendered his final decree, allowing the demand of the complainant, and ordering the delivery of said trust deed, and ordering the sale of the land embraced therein for the payment of the said demand.

Both parties have appealed. The defendant, W. A. Collier, appealed from the entire decree, and the complainant, the Cole Manufacturing Company, appealed from so much of the decree as excluded interest on the amount found due from May 1, 1890, to January 1, 1891, or only allowed interest from January 1, 1891. The defendant, W. A. Collier, assigns for error that the court below erred in overruling his demurrer and subsequently decreeing, on the pleadings and proof, that the agreement to arbitrate was not a bar to the suit.

We do not deem it necessary to consider whether the complainant, by allegation or proof, furnished an excuse or satisfactory reason for failing or refusing to submit any matter in

controversy raised on either side to arbitration under the provisions of the agreement of November 14, 1889. In the condition of this litigation, and under the rules of law controlling the issues made by the parties and the proof adduced, such inquiry is immaterial.

The position of the defendant is, that in the case of any difference or controversy between him and the complainant in relation to any of the matters contained in their agreement, no suit could be brought by the complainant until there had been an offer made to settle the controversy by arbitration; or in other words, that an arbitration, or an effort to arbitrate, was a condition precedent to the right of the complainant to institute its suit. This contention is erroneous.

In *Hamilton v. Home Ins. Co.*, 137 U. S. 370, the policy of insurance on which the action was based provided: "In case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award, in writing, shall be binding on the parties as to the amount of such loss or damage." The plaintiff had refused to enter into arbitration. The instruction of the trial judge to the jury, that the plaintiff could not maintain his action, because he had so refused, was adjudged erroneous.

In that case a number of decisions are cited, which establish the rule that the breach, by the plaintiff, of the agreement to submit to arbitration cannot be pleaded in bar of the action on the principal contract, unless such agreement expressly or by necessary implication made the submission a condition precedent to the institution of any suit.

Hamilton v. Home Ins. Co., 137 U. S. 370, is distinguished by Mr. Justice Gray, who delivered the opinion therein, from *Hamilton v. Liverpool etc. Ins. Co.*, 136 U. S. 242, wherein the policy involved contained an express condition that no action should be brought until there had been a submission to arbitration.

In the case of *The Excelsior*, 123 U. S. 40, which involved a liability in admiralty for salvage service, the parties had agreed to submit to arbitration the amount to be paid for the service. The defendant made the point that the suit could not be maintained, because of the omission to submit to arbitration, and the court held the objection to be ineffectual, and

said that the remedy of the defendant, if any, would be in an action for breach of agreement to submit.

In this view of the case, it is also unnecessary to discuss or consider the inquiry whether this agreement to submit to arbitration was void because it operated to oust the jurisdiction of the courts.

We have fully investigated the evidence contained in the record as to the liability of the defendant, W. A. Collier, to the complainant for the amount claimed by the plaintiff, and have therefrom reached the conclusion that the complainant has fully established its claim, and that the defendant has failed to establish the items set up by way of cross-action in his cross-bill.

There was no error in the action of the chancellor in refusing to allow the complainant interest prior to January 1, 1891. That was a matter which, under established rules of law, rested entirely within the sound discretion of the chancellor, and with the exercise of which we do not feel at liberty to interfere.

Let the decree of the chancellor be affirmed. The costs of the chancery court will be paid as adjudged in the court below, and the costs of this court will be divided, one half thereof to be taxed against the complainant, and the other half against the defendant, W. A. Collier.

AGREEMENTS TO SUBMIT TO ARBITRATION: See, generally, note to *Commercial Union Assur. Co. v. Hocking*, 2 Am. St. Rep. 566, where references are made to the earlier notes on the same subject appended to *Allegre v. Maryland Ins. Co.*, 14 Am. Dec. 296; *Nettleton v. Gridley*, 56 Am. Dec. 381. A condition, in a building contract, that all disputes concerning the value of extra work shall be determined by arbitration is valid, and precedent to recovery: *Holmes v. Richet*, 56 Cal. 307; 38 Am. Rep. 54. Condition in policy of insurance providing for arbitration cannot deprive insured of his right of action, unless clearly made a condition precedent to the existence of such right: *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598. Compare *Continental Ins. Co. v. Wilson*, 45 Kan. 250; 23 Am. St. Rep. 720; *German American Ins. Co. v. Elherton*, 25 Neb. 505.

RAILROAD v. KELLY.

[91 TENNESSEE, 692.]

A RAILROAD CORPORATION'S LIABILITY AS A COMMON CARRIER TERMINATES when the goods are safely stored in its depot.

WAREHOUSEMAN. — NEGLIGENCE OF A WAREHOUSEMAN IS NOT ESTABLISHED BY PROOF OF A FIRE, and the destruction thereby of goods stored with him.

A RAILROAD CORPORATION IS LIABLE AS A WAREHOUSEMAN FOR THE LOSS OF GOODS IN ITS DEPOT BY FIRE, if before such fire they were called for by the consignee, who was falsely informed by the employees of the corporation that the goods had not been received, and he was thereby prevented from removing them. Though the giving of this false information did not occasion the fire by which the goods were destroyed, it did cause them to be left in the depot to be consumed by such fire. Notwithstanding the fire, the goods would not have been lost but for the wrong and negligence in denying that they had been received.

NEGLECT, OF WHAT A PROXIMATE CAUSE. —The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted, notwithstanding the latter.

DAMAGES. — MEASURE OF DAMAGES when goods shipped over railway are destroyed through the negligence of a corporation is their value at the place where they are stored.

Lewis Shepard, for the plaintiff in error.

Robert P. Woodard and W. G. M. Thomas, for the defendant in error.

CALDWELL, J. This suit was brought by J. W. Kelly, before a justice of the peace, to recover from the East Tennessee Virginia, and Georgia Railway Company the value of five barrels of whisky. He recovered judgment for \$492, and on appeal the circuit judge, sitting without a jury, affirmed the magistrate's judgment, adding interest thereto.

The railway company has appealed in error, and in this court, as below, denies its liability, either as common carrier or warehouseman.

Kelly purchased five barrels of whisky in New York, and caused them to be consigned to himself at Chattanooga, his place of business. The East Tennessee, Virginia, and Georgia Railway Company was the last carrier over whose line the goods passed. On April 24, 1891, that company unloaded the whisky from its car, and stored the same in its depot at Chattanooga, where it remained until the morning of the 29th of the same month, when it was destroyed by fire.

Kelly, through his drayman, called at the depot and de-

manded the whisky on April 25th, 26th, 27th, and 28th, generally twice a day, and was each time told by the company's agent that it was not there.

How the fire was produced is not disclosed.

Under these facts, the railway company is not liable as a common carrier. Its carrier responsibility terminated when the goods were safely stored in its depot, and before they were destroyed: *Butler v. East Tennessee etc. R. R. Co.*, 8 Lea, 32; *Southern Exp. Co. v. Kaufman*, 12 Heisk. 165 (last paragraph).

We are aware that the authorities are in a state of irreconcilable conflict upon this question, several of the states having followed the lead of Massachusetts in holding that the liability of the common carrier, as such, is ended when the transportation is completed and the goods are safely stored, and several others having given their sanction to the doctrine announced in New Hampshire, to the effect that the carrier responsibility continues until the consignee has had a reasonable opportunity, after the arrival of his goods, to receive them.

Discussion of the respective considerations upon which the two rules are rested by their opposing adherents will not be indulged in this opinion, since this court has heretofore adopted the Massachusetts rule, and no sufficient reason for changing the precedent already established is perceived.

The cases of *Butler v. East Tennessee etc. R. R. Co.*, 8 Lea, 32, and *Southern Exp. Co. v. Kaufman*, 12 Heisk. 165, have been followed in several unreported cases, the last of which was *East Tennessee etc. R'y Co. v. Gettys*, Tenn., Oct. 1892.

In 2 Am. & Eng. Ency. of Law, 391-394, the two rules are stated, and many of the decisions in support of each cited. Tennessee is there erroneously referred to as one of the states adopting the New Hampshire doctrine. See also, on same subject, Story on Bailments, sec. 543; Schouler on Bailments, secs. 512-514; and Mechem's Hutchinson on Carriers, 2d ed., secs. 367-374, inclusive. The last author, in section 370, correctly places Tennessee among the states following the Massachusetts rule.

Then as to these goods at the time of their destruction, the railway company had ceased to be a common carrier with the liability of an insurer, and had assumed the less hazardous position of warehouseman, in which it was bound to use ordinary care and diligence only, and was responsible alone for the consequences of its negligence: Schouler on Bailments,

secs. 101, 513; *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 85, 86; 24 Am. St. Rep. 586.

Is the railway company liable as warehouseman? If the loss resulted from its negligence as the proximate cause, yes; if not, no; for the doctrine of proximate and remote cause applies here, as in any other case where negligence is the ground of action. The burden of showing negligence, and its causal connection with the loss, was upon the plaintiff: Schouler on Bailments, sec. 101; *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 35, 36; 24 Am. St. Rep. 586; *Louisville etc. R'y Co. v. Manchester Mills*, 88 Tenn. 653; Hutchinson on Carriers, 2d ed., sec. 767.

In this case, there is no proof as to the cause of the fire; hence the defendant is not chargeable with negligence in causing it. Mere proof of the fire and destruction of the goods does not show negligence: *Louisville etc. R'y Co. v. Manchester Mills*, 88 Tenn. 653; *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 85, 86; 24 Am. St. Rep. 586. Therefore, if the plaintiff succeed, he must do so without reference to the cause of the fire.

It is distinctly shown that he demanded the goods several times, and that the defendant, without sufficient excuse, failed to deliver them. That alone makes a clear case of negligence; but, manifestly, that negligence did not cause the fire. Did it, nevertheless, proximately cause the loss of the goods?

The fire and the loss may have had different causes. The fire destroyed the goods, but it does not follow that the cause of the fire and the cause of the loss to plaintiff were one and the same, in legal contemplation; they may have been entirely different. The failure to deliver the goods when demanded did not cause the fire, but it did cause the loss, in such sense that they would not have been lost without the failure. Had the defendant delivered the goods, they would have been removed and the loss averted. The negligent and wrongful detention of the goods, and that alone, exposed them to the fire; and, but for that detention, they would not have been destroyed, though the fire did occur. Thus it becomes obvious that the negligence of the railway company was the proximate cause of the loss. The causal connection between the failure to deliver the goods and the injury to the plaintiff is complete.

In a late case, where a train broke in two, thereby exposing cotton on the rear section to a fire, which consumed it, this

court, speaking through Judge Snodgrass, said: "The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter. Illustrating by these facts, it is true, the fire destroyed the cotton, and in that sense caused the loss; but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it had not the breaking of the train while it was being removed happened, so that, but for this fact, the cotton would have been saved. This [the breaking of the train] must therefore be held to be the proximate cause of the loss, and if it was the result of negligence, the carrier must answer for it": *Deming v. Merchants' Cotton-press etc. Co.*, 90 Tenn. 353.

That definition and illustration of proximate cause is conclusive of this case. There, as here, the fire which consumed the goods was caused without the fault of defendant, and there, as here, the goods became exposed to the fire through the negligence of the defendant, but for which the injury would not have been inflicted. There, as here, that negligence, and not the fire or its cause, proximately caused the loss to the owner.

Lamont v. Nashville etc. R. R. Co., 9 Heisk. 58, is not in conflict with the case last cited, or the decision here made.

Our attention has been called to several cases from other states.

In that of *Burlington etc. R. R. Co. v. Arms*, 15 Neb. 69, the consignee called for his goods several times after the arrival, and was told each time, by the company's agent, that they had not been received. Thereafter, without any other negligence on the part of the company, its depot was burned, and the goods destroyed. The owner recovered the value of his goods.

In *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574, the goods were called for upon arrival at destination, but delivery was refused until the next day, because it was not "convenient" then to deliver them. The warehouse and goods were destroyed that night by fire. The defendant was held liable for the loss.

In *Kansas City etc. R. R. Co. v. Morrison*, 34 Kan. 502, 55 Am. Rep. 252, the owner demanded his trunk, and was informed it had not come, when in fact it had come. The com-

pany's depot was subsequently entered, the trunk broken open and robbed by burglars, without fault of the company. The owner obtained judgment for the contents of his trunk.

In *Richmond etc. R. R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446, there was a deviation in route of shipment, causing some delay, and, after arrival of the goods, demand was made, and delivery refused. The goods were thereafter destroyed in the depot by an unprecedented flood, and, upon suit being brought, the company was held liable for their value.

Though decided upon similar facts, those cases are not of much importance here, because in each of them the defendant was adjudged liable as common carriers, and that without reference to the question as to whether or not its negligence proximately caused the injury. In the Georgia case the court said that the wrongful acts of the company constituted a conversion of the goods. A mere inadvertent statement, by the agent, to the owner demanding goods then in the company's depot, that they have not arrived, is not a conversion: *Louisville etc. R. R. Co. v. Campbell*, 7 Heisk. 258.

For the reasons stated, the railway company is liable, in this case, as warehouseman.

The goods having been totally destroyed, the measure of damages was the value of the goods at Chattanooga: *Hutchinson on Carriers*, sec. 769; *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 322; *Mobile etc. R'y Co. v. Jursy*, 111 U. S. 585; *Dean v. Vaccaro*, 2 Head, 489; 75 Am. Dec. 744; *Erie Dispatch v. Johnson*, 87 Tenn. 490.

Affirm the judgment, with costs.

RAILROAD COMPANIES, WHEN THEIR LIABILITY AS COMMON CARRIERS TERMINATES. — Liability does not terminate until the car containing the goods has been placed in such a position that it can be conveniently unloaded by the consignee: *Independence Mills Co. v. Burlington etc. R'y Co.*, 72 Iowa, 535; 2 Am. St. Rep. 258, and note, in which other cases in the American Decisions relating to this subject are cited. If the owner of the goods permits them to remain at the depot an unreasonable time, the liability of the company as common carrier is thereby terminated, and it becomes liable as warehouseman only: *Union Pac. R'y Co. v. Moyer*, 40 Kan. 184; 10 Am. St. Rep. 183. See also note to *Lancaster Mills v. Merchants etc. Co.*, 24 Am. St. Rep. 613. After placing the goods in the warehouse, he is liable only for ordinary neglect: *Schenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109; 100 Am. Dec. 541; *Burroughs v. Grand Trunk R'y Co.*, 67 Mich. 351; *Gabretton etc. R'y Co. v. Smith*, 81 Tex. 479.

NEGLIGENCE. — PROXIMATE AND REMOTE CAUSE: See illustrative cases in the notes to *Forney v. Geldmacher*, 42 Am. Rep. 390-393; *Hancy v. Dennis*,

47 Am. Rep. 381-387; *White v. Conly*, 52 Am. Rep. 157-166. In determining what is a proximate cause, the true rule is, to consider whether the injury is the natural and probable consequence of the negligence: *West Mahanoy Tp. v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604. This results from the principle that one who is guilty of negligence is deemed to have foreseen, and is liable for all consequences which may naturally ensue therefrom, without the intervention of some other independent agency, although, in advance, the actual result might have been improbable: *Bunting v. Hogsett*, 139 Pa. St. 363; 23 Am. St. Rep. 192, and note; *Quigley v. Delaware etc. Canal Co.*, 142 Pa. St. 388; 24 Am. St. Rep. 504. Another way of expressing the rule is, that if the facts constitute a continuous succession of events, so linked together that they become a natural whole, liability will attach; while if the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the negligence, liability will not attach: *Haverly v. State Line etc. R. R. Co.*, 135 Pa. St. 50; 20 Am. St. Rep. 848. In other words, there must, between the injury and the negligence, be a causal connection, uninterrupted by the interposition of any independent human agency: *Owrtin v. Somerset*, 140 Pa. St. 70; 23 Am. St. Rep. 220.

MEASURE OF DAMAGES, when personal property is lost or destroyed by the negligent act of another, is the full market value of the property at the time of the loss, and interest thereon: *Atlanta etc. Mills v. Coffey*, 80 Ga. 145; 12 Am. St. Rep. 244.

RICHARDS v. STATE.

[91 TENNESSEE, 723.]

WITNESSES — CO-DEFENDANTS — RIGHT TO PLACE UNDER THE RULE. — If, during the trial of two persons charged with crime, they announce their purpose to testify as witnesses, each for himself, neither can be placed under the rule, and excluded from the room during the examination of the other.

S. G. Heiskell, for the plaintiff in error.

Attorney-General Pickle, for the state.

LURTON, J. John and James Richards were jointly indicted for murder, and tried together. Both were convicted, — James of an assault and battery, and John of voluntary manslaughter. The latter only has appealed. After the conclusion of the state's evidence, the defendants announced their purpose to testify as witnesses, each for himself. James was first offered for examination, whereupon the court, on motion of the district attorney, ordered that John should be placed under the rule, and excluded from the court-room during the examination of his co-defendant. To this ruling, and against his conse-

quent exclusion from the court-room while his co-defendant was being examined, John Richards excepted. The ruling of the court was erroneous.

The constitution guarantees to every defendant in a criminal prosecution "the right to be heard by himself and his counsel": Const., art. 1, sec. 9.

This guaranty includes the right to be present at every stage of the trial: *Andrews v. State*, 2 Sneed, 550; *Witt v. State*, 5 Cold. 11; Cooley's Constitutional Limitations, 390.

It has been suggested that the right of a defendant to testify in a criminal prosecution is, by the statute conferring the right, limited to the delivery of evidence "for himself," and that he may not testify either for or against a co-defendant. If this were conceded, it would nevertheless be error to prevent a co-defendant from being present during such evidence. How else could he see and know that the evidence was limited as indicated by the suggestion, or that the jury were properly guarded against giving effect to it as against the absent co-defendant? But we do not assent to the limitation put upon the testimony of such a co-defendant. When one of several defendants on trial together voluntarily becomes a witness, he is a witness for all purposes. If he knows facts injurious to a co-defendant, they may be brought out either by his own counsel or by the state. The witness's best line of defense for himself may lie in evidence involving the guilt of his co-defendant. On what principle shall it be said that such testimony would be inadmissible? If admissible in his own interest, how is its effect upon his co-defendant to be prevented? Practically, it could not fail to be injurious and prejudicial, even if the jury were instructed to disregard it as to the co-defendant affected. We know of no principle which would exclude any competent evidence, simply because it came from a co-defendant testifying for himself under the statute. In view of the possible prejudice of such evidence, or of its possible advantage, the right to be present, and to hear and examine such a witness when testifying for himself, is an important right to every other defendant jointly on trial with the testifying defendant. The violation of this right is clearly reversible error.

For this error, as well as for another occurring in the charge, and which we state orally, this case must be reversed, and remanded for a new trial.

RIGHT OF ACCUSED TO BE PRESENT DURING HIS TRIAL. — Prisoner, where the felony is capital, has a right to be, and must be, personally present at all times in the course of his trial, when anything is said or done affecting him as to the charge against him in any material respect; where the felony is less than capital, he has the same right to be present, but it is not essential to conviction that he must be so, at all events: *State v. Kelly*, 97 N. C. 404; 2 Am. St. Rep. 299. Cases sustaining the rule that a defendant testifying in his own behalf has a right to remain in the court-room while other witnesses are giving their testimony are *German v. State*, 66 Miss. 196; *Bell v. State*, 66 Miss. 192.

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ACCOUNTING.

See ACCOUNTS; CO-TENANCY; FRAUDULENT CONVEYANCES, 2.

ACCOUNTS.

BILL FOR ACCOUNTING, ALLEGATIONS NECESSARY IN. — A bill seeking relief against a usurious contract cannot be upheld as a bill for an accounting, unless it alleges that the complainant does not know, and cannot by the exercise of proper diligence ascertain, the sums received and paid by him on such usurious contract. *American Freehold Land etc. Co. v. Jefferson*, 587.

ACKNOWLEDGMENT.

1. **DEEDS — SUFFICIENCY OF.** — A certificate of acknowledgment must be held sufficient, when it shows, either alone, or aided by the instrument acknowledged, that the acknowledgment was made before or taken by any officer authorized by law to do so. *Summer v. Mitchell*, 106.
2. **DEEDS. — STATUTORY REQUIREMENT OF AN EXPRESS STATEMENT OF FACT** in a certificate of acknowledgment cannot be supplied by a mere presumption of such fact. *Summer v. Mitchell*, 106.
3. **DEEDS — EVIDENCE TO SUPPORT.** — When a certificate of acknowledgment to an instrument states the title of an officer not authorized to take the acknowledgment, but the signature thereto, together with its suffix alone, or read in connection with the instrument, shows an officer having such authority, the signature and its suffix will control. *Summer v. Mitchell*, 106.
4. **DEEDS — EVIDENCE TO SUPPORT — PRESUMPTION.** — The instrument acknowledged may be resorted to in support of the acknowledgment; and when the same name appears as a witness to the execution of the instrument, and to the certificate of acknowledgment as the officer taking it, it will be presumed, in favor of the certificate, that both names represent the same person. *Summer v. Mitchell*, 106.
5. **DEEDS — DEED AS EVIDENCE TO SUPPORT.** — When a deed is referred to in a certificate of acknowledgment in such manner as to connect the

- former with the latter, or make it substantially a part thereof, and reading them together, there can be found a substantial compliance with the demands of the statute, the certificate should be sustained. *Summer v. Mitchell*, 106.
6. **SEAL AS EVIDENCE.** — When an officer taking an acknowledgment affixes his official seal thereto, no other evidence of his official character is required. *Summer v. Mitchell*, 106.
 7. **DEEDS — PRESUMPTION IN FAVOR OF — OFFICIAL SEAL.** — Statutes regulating the recording of instruments do not contemplate the inscription of public official seals upon the record. If an acknowledgment of an instrument as recorded shows by its language that the official seal of the officer taking it was thereto affixed, the absence of such seal, or of anything representing it, from the record, or a transcript thereof, will not overcome the presumption that the proper seal was affixed to the original. *Summer v. Mitchell*, 106.
 8. **DEEDS.** — A DEPUTY whose principal is authorized to take acknowledgments to instruments may legally take them in his own name as deputy, without mentioning his principal. *Summer v. Mitchell*, 106.
 9. **DEEDS — ACKNOWLEDGMENTS BEFORE DEPUTY.** — A certificate of acknowledgment is not the less the act of the proper officer because made by his authorized deputy. *Summer v. Mitchell*, 106.
 10. **DEEDS — ACKNOWLEDGMENTS BY DEPUTY — PRESUMPTION.** — When an instrument acknowledged in another state is valid if acknowledged before the clerk of a court, and such instrument appears to have been acknowledged before the deputy clerk of such court, and is signed by him as such, and has the seal of his office attached, it will be presumed, in favor of such acknowledgment, that the clerk had authority to appoint a deputy, and that his acknowledgment is valid. *Summer v. Mitchell*, 106.
 11. **INITIALS SUFFICIENT TO INDICATE OFFICIAL CAPACITY — CLERICAL ERRORS DO NOT DEFEAT.** — Initials of title of an officer are sufficient to indicate his character when taking an acknowledgment; and clerical errors are not permitted to defeat or render acknowledgments ineffectual, when they, considered alone, or read in connection with the instrument acknowledged, fairly show a compliance with the statute. *Summer v. Mitchell*, 106.
 12. **DEEDS — OFFICIAL CAPACITY OF OFFICER.** — A certificate of acknowledgment, of itself, or aided by the instrument acknowledged, must show the title and character of the officer taking the acknowledgment, but this may be shown by the initials of the office as well as if his title were fully written out. *Summer v. Mitchell*, 106.
 13. **DEEDS — OFFICIAL CAPACITY, HOW MAY APPEAR.** — The title of an officer taking an acknowledgment may be written out fully in the body of the certificate, and when this is done, its omission from the signature is immaterial; or the title of the officer may be affixed to the signature, and if so, this, of itself, is sufficient, and the use of initials generally understood to stand for the title of an office will answer the same purpose as the full title. *Summer v. Mitchell*, 106.
 14. **DEEDS — TECHNICAL ERRORS WILL NOT DEFEAT.** — It is the policy of the law to uphold certificates of acknowledgment, and whenever substantial compliance with law is found, obvious clerical errors and all technical defects or omissions will be disregarded. Inartificialness in execution cannot be permitted to defeat them, if, looking at them as a whole, they reasonably and fairly comply with the law. *Summer v. Mitchell*, 106.

- 15. CONSTITUTIONAL LAW — POWER OF LEGISLATURE OVER DEFECTIVE ACKNOWLEDGMENTS.** — In the absence of any inhibiting constitutional limitation, and except as against prior vested rights, the legislature has power to cure, by retroactive legislation, defective acknowledgments of deeds, in all cases where the purpose of the acknowledgment is the admission of the instrument acknowledged to record or its use as evidence. *Sumner v. Mitchell*, 106.
- 16. CONSTITUTIONAL LAW — POWER OF LEGISLATURE OVER ACKNOWLEDGMENTS.** — A statute providing that deeds theretofore executed and acknowledged in compliance with its provisions shall have the same force and effect as if executed after its passage validates, from its approval, every prior acknowledgment of a deed made out of the state conveying land therein, when the acknowledgment of such deed complies with the provisions of such statute. *Sumner v. Mitchell*, 106.

ACTIONS.

- 1. FIGHTING, LIABILITY FOR INJURIES INFLICTED IN.** — If two persons voluntarily engage in a fight, either may maintain an action against the other to recover damages for injuries received. The fact that the fight was voluntary is admissible only in mitigation of damages. *Gretton v. Gladden*, 418.
- 2. MONUMENT AT GRAVE OF DECEDENT, ACTION BY HEIRS FOR INJURY TO OR REMOVAL OF.** — The heirs of a decedent, at whose grave a monument has been erected, or the person who rightfully erected it, can recover damages from one who wrongfully injures or removes it, or by an injunction may restrain one who, without right, threatens to injure or remove it, even though the title to the ground wherein the grave is be not in the plaintiff, but in another. *Mitchell v. Thorne*, 699.
- See ARBITRATION AND AWARD; CARRIERS, 9; COURTS, 2; EXECUTION, 1; INSOLVENCY, 1; JUDGMENTS, 5; PARENT AND CHILD, 2; PLEADING, 1; RAILROADS, 47; SCIRE FACIAS; TELEGRAPHS, 2.**

ACT OF GOD.

See CARRIERS, 8; NEGLIGENCE, 7.

ADOPTION.

See PARENT AND CHILD, 1.

AGENCY.

- 1. ESTOPPEL.** — ONE WHO SIGNS A PAPER IN BLANK, AND INTRUSTS IT TO HIS AGENT for commercial purposes, gives him apparent authority to use it, and is therefore bound by a promissory note which the agent writes over such signature, though what the principal intended should be written was an order on a savings bank in which he had funds. *Breckenridge v. Lewis*, 353.
- 2. POWER OF ATTORNEY TO ASSIGN JUDGMENT NEED NOT BE RECORDED.** — The statute requiring a power of attorney to be recorded does not apply to a power to assign judgments. *Boos v. Morgan*, 237.
- See BANKS, 7-9; EVIDENCE, 3; FALSE PRETENSES, 3; FRAUD, 4; FRAUDULENT CONVEYANCES, 7, 8; INSURANCE, 5, 7; MASTER AND SERVANT, 6; PROCESS, 1; RAILROADS, 10; TELEGRAPHS, 1, 2; TRUSTS, 5, 6.**

ANIMALS.

1. **DOGS — RIGHT TO KILL, AS NUISANCES.** — A property owner who keeps no dog, and who, together with his family, has been seriously and nightly annoyed for some time by a congregation of barking, quarreling, and fighting dogs upon his premises, has a right to use all reasonable and necessary means to protect his family from such a nuisance, and he cannot be held liable for the value of a dog killed by him in an attempt to drive them away, if he did not know who owned any of them, and did not shoot at any particular dog. *Hubbard v. Preston*, 426.
2. **FEROCIOUS DOGS — LIABILITY OF OWNER FOR ALLOWING AT LARGE.** — One who enters the rear of the premises of another, through an open gate, on lawful business, and is bitten by ferocious dogs running at large, of which he has no notice, may recover of the owner, who, knowing the vicious character of his dogs, thus allows them to run loose on his open premises. *Conway v. Grant*, 145.

See MUNICIPAL CORPORATIONS, 7, 8; REAL PROPERTY, 1, 2.

ANTENUPTIAL CONTRACTS.

See MARRIAGE AND DIVORCE.

APPEAL.

1. **FAILURE OF PROOF DUE TO ACT OF COURT NOT AVAILABLE ON APPEAL WHEN.** — When a defendant, while giving evidence to show that he performed the acts complained of under the authority of the United States government, is interrupted by the trial court with the statement that further proof is unnecessary, and thereupon desists from presenting further evidence on that point, the question as to such authority cannot be raised by the plaintiff on appeal. *Benner v. Atlantic Dredging Co.*, 649.
2. **VERDICT NOT OBJECTED TO NOT DISTURBED ON APPEAL.** — Where no motion is made in the trial court to set aside a verdict, the supreme court will assume it to be correct, and will not disturb it, if there is no error in the rulings of the court specially excepted to during the trial. *Western Union Tel. Co. v. Jones*, 579.
3. **DECISION OF QUESTION OF FACT BY TRIAL COURT NOT DISTURBED ON APPEAL WHEN.** — Where the evidence upon the trial of an issue of fact is conflicting, the decision of the trial court thereon will not be disturbed by the supreme court, if it believes it to be warranted by the testimony. *Alabama etc. Ry Co. v. Bolding*, 541.
4. **JURY TRIAL.** — IF A COURT INSTRUCTS A JURY TO DISREGARD EVIDENCE which had been received against objection and exception, the exception is thereby vitiated, and the error in admitting the evidence is no longer available in any appellate proceeding. *Alabama etc. R. R. Co. v. Frazier*, 28.
5. **EVIDENCE — ERRONEOUS ADMISSION OF.** — To permit a party to prejudice the jury by giving improper and immaterial statements in evidence is reversible error. *Williams v. Clink*, 443.
6. **OPINIONS OF AN APPELLATE COURT, OF WHAT CONCLUSIVE.** — The effect of an opinion must be determined from examining it, and ascertaining therefrom what the court had agreed to upon consultation. The court concurs in and is bound by the opinion as it appears, and not by anything outside of it, and its effect cannot be limited by looking into the record and showing that there were other and different facts upon which

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- See ARBITRATION AND AWARD; CARRIERS, 9; COURTS, 2; EXECUTION, 1; INSOLVENCY, 1; JUDGMENTS, 5; PARENT AND CHILD, 2; PLEADING, 1; RAILROADS, 47; SCIRE FACIAS; TELEGRAPHS, 8.**

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ASSIGNMENT.

See AGENCY, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS; CORPORATIONS, 6, 7; LANDLORD AND TENANT; LEGACY, 1; MORTGAGES, 2-4, 7-9; NEGOTIABLE INSTRUMENTS, 6; SALES, 6, 7.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

ASSIGNEE FOR THE BENEFIT OF CREDITORS IRREVOCABLY ELECTS to treat the assignment as void if he files an attachment bill against the assignor alleging the assignment to be fraudulent and void, although his action was prompted by the mistaken advice of his attorney respecting the validity of the assignment. It is not material that no loss or injury occurred to any one from the proceeding taken by the assignor in hostility to the assignment. *O'Bryan v. Glenn*, 862.

ASSOCIATIONS.

1. **BENEFIT SOCIETY, MEMBER OF, MAY DIRECT CERTIFICATE ISSUED IN FAVOR OF STRANGER.** — A member of the Ancient Order of United Workmen of the State of New York can legally direct the sum to become due at his death to be paid to a stranger having no insurable interest in his life, since neither the statute under which the society is organized nor the by-laws of the society impose any limitation on the persons to whom certificates shall be payable. *Sabin v. Phinney*, 681.
2. **APPOINTEE IN CERTIFICATE OF BENEFIT SOCIETY HAS NO VESTED INTEREST.** — An appointee in a certificate of membership in a benefit society acquires no vested interest in the sum payable thereunder of which he cannot be deprived without his consent, and the member may therefore, during his lifetime, at his will, change the appointee, from time to time, as he may elect. *Sabin v. Phinney*, 681.
3. **BENEFIT SOCIETIES — LOSS OF CERTIFICATE — CHANGE OF BENEFICIARY BY WILL.** — When a certificate of membership and insurance in a benefit society is lost or mislaid by the assured, without fault on his part, so that it is impossible for him to name a new beneficiary in the manner prescribed by the by-laws of the society, a court of equity will enforce his disposition of the insurance by a will, in which he names a new beneficiary. *Grand Lodge v. Noll*, 419.

ATTACHMENT.

1. **GARNISHMENT OF WAGES DUE FROM A CORPORATION CHARTERED IN TWO OR MORE STATES** may be effected in each state, though such wages are due to a non-resident for services rendered in another state. *Railroad v. Barnhill*, 889.
 2. **CONFLICT OF LAWS. — GARNISHMENT OF INDEBTEDNESS ARISING IN ANOTHER STATE** under a contract made there between a citizen thereof and a corporation may be effected by service of process in this state, if such corporation is also chartered in this state and here carries on business, though the person to whom the debt is due remains a non-resident. *Railroad v. Barnhill*, 889.
- See** ASSIGNMENT FOR BENEFIT OF CREDITORS; REPLEVIN; SURETYSHIP, 1.

ATTESTATION.

See WILLS, 4, 6, 9, 10.

the court might have acted and founded its judgment. *Ruohs v. Athens*, 858.

J. JUDGMENT FINAL WILL BE RENDERED BY APPELLATE COURT WHEN. —
Where the facts are not in dispute, and all the matters appear on the face of the record, enabling the appellate court to ascertain and declare the justice of the case, it will render such a judgment as will secure to each party his just rights, instead of remanding the cause for a new trial. *McAfee v. Reynolds*, 194.

See INSURANCE; JUDGMENTS, 11; MUNICIPAL CORPORATIONS; NEW TRIAL; STATUTES, 5; TRIAL.

APPOINTMENT.

See OFFICERS, 1, 3.

APPRAISEMENT.

See EXECUTION, 1.

APPURTENANCES.

AN APPURTENANCE IS A THING BELONGING TO ANOTHER THING AS PRINCIPAL, and passing as an incident thereto. Therefore, poles planted in the streets of a city, necessary to transmit electricity from a power-house, are appurtenant thereto. *Badger Lumber Co. v. Marion Water Supply etc. Co.*, 301.

See MECHANICS' LIENS, 3.

ARBITRATION AND AWARD.

ARBITRATION — SUBMISSION TO, WHEN NOT A CONDITION PRECEDENT TO RIGHT OF ACTION. —If a contract for the erection of a building declares that in case any difference should arise between the parties as to the quality of work or materials, or as to any other question, the same shall be settled by arbitration, the contractor may nevertheless maintain an action under the contract, without first submitting, or offering to submit, to arbitration. The breach of the stipulation to submit to arbitration cannot be pleaded in bar to an action on the principal contract, unless it expressly or by necessary implication makes the submission a condition precedent to the maintenance of any suit. *Cole Mfg. Co. v. Collier*, 898.

ARCHITECTS.

See CONTRACTS, 8.

ARREST.

See MALICIOUS PROSECUTION, 1, 2, 8, 17.

ASSAULT.

See EVIDENCE, 7; RAILROADS, 21-25; RAPE.

ASSESSMENTS.

See MUNICIPAL CORPORATIONS, 13, 14; STATUTES, 3, 4, 6; TAXES, 1, 2.

ASSETS.

See MORTGAGE, 8-10.

on the part of the bailee, and makes him liable for ordinary neglect. Such bailment exists only in cases where the bailment is a necessary incident of the business in which the bailee makes a profit, as in the case of a customer and a store-keeper. *Woodruff v. Painter*, 786.

6. **LIABILITY OF STORE-KEEPER — CUSTODY OF CUSTOMER'S PROPERTY — AUTHORITY OF SALESMAN.** — An open store is an invitation to the public to enter, and whatever a customer necessarily, or in common with people generally, habitually carries with him, and must necessarily lay aside in the store while making or examining his purchases, he is invited to lay aside by the invitation to come and purchase, and having laid it aside upon such invitation, and with the knowledge of the dealer, he has committed it to his custody. The care of such property is within the authority of the salesman assigned to wait upon the customer, and is a part of the transaction in which he is authorized to represent his employer. *Woodruff v. Painter*, 786.

See PLEDGE.

BANKRUPTCY.

See INSOLVENCY.

BANKS.

1. **DUTY OF BANK TO APPLY DEPOSIT TO PAYMENT OF NOTE.** — When a bank becomes the holder of a note for value in the ordinary course of business, and before maturity, it takes it relieved of equities existing between the original parties, and may recover on its title as holder. While it may appropriate funds in its hands belonging to any previous party to the note to its payment, when payment is not made at the time and place named, yet it is not bound to do so, except as to the maker. *Mechanics etc. Bank v. Seitz*, 853.
2. **DUTY OF BANK TO APPLY MAKER'S DEPOSIT TO PAYMENT OF NOTE.** — When a bank is the *bona fide* holder of a note at its maturity, and also holds funds of the maker, it is bound to consider the interests of the indorsers or sureties, and to apply such funds to the payment of the note. If it allows the maker to withdraw his funds after protest, causing the indorsers to lose thereby, it is liable to them. *Mechanics etc. Bank v. Seitz*, 853.
3. **DUTY TO APPLY DEPOSIT TO PAYMENT OF NOTE.** — When a bank is the holder of an indorsed note at maturity, the maker cannot require the bank to apply the indorser's funds on deposit to its payment, nor complain if the bank refuses to do so. *Mechanics etc. Bank v. Seitz*, 853.
4. **APPLICATION OF INDORSER'S DEPOSIT AS PAYMENT OF NOTE.** — When a bank becomes the holder of an indorsed note, acquired before maturity, for value, and without any notice of equities, and its clerk charges the note to the account of the indorser upon its maturity and protest, but afterwards, by direction of the bank cashier, corrects this, by entry of a credit, so as to make the indorser's account stand as before, the act of the clerk in so charging up the note is not a payment divesting the title of the bank, nor is the subsequent entry of the credit so made a new purchase of the note after protest, and subject to the equities between the original parties to it, but the bank may still recover on the note against the maker. *Mechanics etc. Bank v. Seitz*, 853.
5. **INSOLVENT BANK, PERSON COLLECTING NOTE THROUGH, ENTITLED TO NO PRIORITY OVER OTHER CREDITORS.** — Where a bank to which a note is

ATTORNEY AND CLIENT.

TRUSTS — CONFIDENTIAL RELATIONS. — When, under the express terms of a letter of attorney, the attorney named therein undertakes the duty to protect his client, his estate, and his best interests, a relation of trust and confidence is created between them, and whatever is thereafter done by the attorney in hostility to the duty and confidence reposed in him is a breach of the trust, which renders the transaction voidable. *Darlington's Estate*, 776.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; FRAUD, 1, 3; JUDGES, 2; LIBEL, 3; MALICIOUS PROSECUTION, 13; WILLS, 1-3.

ATTORNEY'S FEES.

See CONTRACTS, 10.

AUSTRALIAN BALLOT.

See ELECTIONS, 3.

BAGGAGE-MASTER.

See MASTER AND SERVANT, 5.

BAILMENTS.

1. **BAILMENT FOR HIRE — DEMAND — FAILURE TO RETURN — BURDEN OF PROOF.** — Proof of failure by a bailee for hire to return the property intrusted to him upon demand is not proof of its loss; but a failure on his part to give any such explanation of his neglect to restore the bailment upon demand as will enable the bailor to test his good faith will be sufficient to hold him to proof that he has exercised ordinary diligence in the care of it. *Woodruff v. Painter*, 786.
2. **BAILMENT FOR HIRE — DEFENSES BY BAILEE — THEFT OF BAILMENT.** — A bailee for hire, where no hire is paid, is entitled to any inferences fairly deducible from his conduct in the care of the bailment, when its return is demanded. Proof that it has been stolen without ordinary neglect on the part of the bailee is a good defense for him. *Woodruff v. Painter*, 786.
3. **LIABILITY OF STORE-KEEPER — IMPLIED CONTRACT.** — A store-keeper, by opening a store, thereby invites the public to come in and transact business in the usual manner; and from such invitation an implied contract arises that no harm that can reasonably be averted shall overtake customers, the consideration for such contract being the chance of profit from their patronage. This implied contract extends to the safety of such property as the customer necessarily or habitually carries with him in pursuance of a universal custom. *Woodruff v. Painter*, 786.
4. **STORE-KEEPER AND CUSTOMER — CARE REQUIRED OF STORE-KEEPER.** — A watch is such a personal belonging as men usually carry with them, and remove from the person and lay aside while in a store selecting and purchasing a suit of clothes; and if a customer, by direction of the store-keeper's salesman, places his watch in a designated drawer in the store, preparatory to such selection and purchase, the store-keeper thereby becomes a bailee, chargeable with ordinary diligence, and responsible for ordinary neglect. *Woodruff v. Painter*, 786.
5. **BAILMENT FOR HIRE — CUSTOMER AND STORE-KEEPER — DEGREE OF CARE.** — A bailment for hire, where no hire is paid, requires ordinary diligence

- 14. LIABILITY OF DIRECTORS FOR THEFT OF PRESIDENT.** — When the funds of a bank are stolen by its president, assisted by its cashier and clerks, by means of false entries wholly concealed from its directors, and which could only be discovered by an expert, while the reports of the condition of the bank made by its president from time to time show it to be in good financial condition, and there is nothing to arouse the suspicion of the directors, they cannot be held liable for the theft. *Sweatt v. Penn Bank*, 718.

See AGENCY, 1; LIBEL, 2; LIMITATIONS OF ACTIONS, 3; TRUSTS, 5, 6.

BENEFICIARIES.

See ASSOCIATIONS; CORPORATIONS, 6; NEGOTIABLE INSTRUMENTS, 8.

BENEFIT SOCIETIES.

See ASSOCIATIONS.

BENEVOLENT ASSOCIATIONS.

See ASSOCIATIONS.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF LADING.

- 1. BILL OF LADING IS CONTRACT WHOSE TERMS CANNOT BE VARIED BY PAROL EVIDENCE.** — The acceptance of a bill of lading by the shipper, with knowledge of its contents, makes it a binding contract, and defines the rights and liabilities of the parties to it. The bill of lading is both a receipt and a contract. As a receipt, it is explainable as between the shipper and the carrier; but parol evidence is not admissible to vary the terms of that portion of it constituting the contract. *Van Allen v. Newton*, 630.
- 2. CONSIGNOR'S ACCEPTANCE OF BILL OF LADING MAKES HIM SHIPPER WHEN.** — When a consignor accepts a bill of lading in which he is named as shipper, his acceptance creates a contract which fixes his relation as such, and imposes upon him the obligations which the law has previously declared to be assumed by those entering into such a contract. The fact that the consignee takes part in the negotiations as to the rate of freight to be paid does not constitute him the shipper. *Van Allen v. Newton*, 630.

See CARRIERS, 4, 9; SALES, 6, 7; SHIPPING.

BLACKMAIL.

See MALICIOUS PROSECUTION, 7.

BLASTING.

See REAL PROPERTY, 8.

BONA FIDE PURCHASER.

See CORPORATIONS, 5; CO-TENANCY; ESTOPPEL; FRAUDULENT CONVEYANCES, 6; JUDICIAL SALES, 1; SALES, 6; SPECIFIC PERFORMANCE, 8.

amount for collection is paid by check on itself, drawn by one of its own depositors having ample funds on deposit, whose account it debits, and then remits by its check, but fails before it is paid, and passes into the hands of a receiver, the owner of the note has no lien on the assets of the bank, and is not entitled to priority over its other creditors. *Billingley v. Pollock*, 585.

9. **PROMISSORY NOTE PAYABLE TO CASHIER OF BANK MAY BE SUED ON BY BANK.** — A promissory note made payable to the cashier of a bank is to be deemed payable to the bank, and the bank may sue thereon as payee. *Brown etc. Paper Co. v. Farmers' Nat. Bank*, 246.

10. **DEPOSIT BY TRUSTEE AS AGENT.** — When a trustee deposits money in a bank to his credit as agent, the bank is discharged by paying it back to the person who made the deposit, and in the absence of notice or knowledge to the contrary, has the right to assume that he will appropriate the money to its proper uses and trusts. *Munnerlyn v. Augusta Sav. Bank*, 159.

11. **DEPOSIT BY TRUSTEE AS AGENT — DEMAND, WHAT SUFFICIENT AS.** — When a trustee deposits money in bank to his credit as agent, a check, drawn by him as agent, presented by the payee, and refused payment, is a sufficient demand to enable the trustee to maintain suit against the bank to recover the amount of his deposit. *Munnerlyn v. Augusta Sav. Bank*, 159.

12. **DEPOSIT BY TRUSTEE — PAYMENT BY BANK.** — When a trustee deposits money in bank to his credit as agent, the bank is discharged by the payment of his checks, whether they designate him as trustee or not. *Munnerlyn v. Augusta Sav. Bank*, 159.

13. **LIABILITY OF BANK DIRECTORS.** — Bank directors, being gratuitous mandatories, are liable only for fraud, or for such gross negligence as amounts to fraud. A bank director cannot be held, as such, to the same ordinary care that he takes of his private affairs; and if he exercises the ordinary care which bank directors usually exercise, he is not liable for a misapplication of the funds of the bank by its officers. *Swentzel v. Penn Bank*, 718.

14. **LIABILITY OF BANK DIRECTORS. — WANT OF ORDINARY CARE** which constitutes negligence on the part of a director of a national bank will constitute negligence on the part of a director of a state bank, and will subject him to the same liability. *Swentzel v. Penn Bank*, 718.

15. **BANK DIRECTORS ARE NOT GUILTY OF GROSS NEGLIGENCE** in not examining the individual ledger of the bank to ascertain its financial condition, when, by the rules of the bank, and of four fifths of the other banks in the same city, bank directors are not permitted to see such book. *Swentzel v. Penn Bank*, 718.

16. **LIABILITY OF BANK DIRECTOR — MEASURE OF CARE.** — When the director of any bank performs his duties as such in the same manner as they are performed by all other directors of all other banks in the same city, he is not guilty of gross negligence or fraud. *Swentzel v. Penn Bank*, 718.

17. **WITHDRAWAL OF DEPOSIT BY DIRECTOR — SUSPENSION OF BANK — REPAYMENT.** — When a director of a bank, acting upon information obtained as such, withdraws the deposit of a partnership of which he is a member on the day of the suspension of the bank, he will be ordered to repay it, as he cannot thus gain a preference over other creditors. *Swentzel v. Penn Bank*, 718.

3. **REGULATIONS — ADOPTION OF.** — A common carrier, though a corporation, makes a regulation its own by adopting and acting upon it, irrespective of the source whence it is derived, and the fact that it was promulgated by a person or board of persons representing a combination of carriers does not impair its effect as a regulation of the carrier adopting it. *Miller v. Georgia R. R. etc. Co.*, 170.
4. **REGULATIONS — HOW AFFECT SHIPPERS WITH NOTICE.** — As between a carrier and its customers who have notice of its regulations before shipments are made, the presumption is, that the parties contracted with reference to such regulations, and they are operative, whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor, with the customary direction to notify the customer, or directly to the customer himself. *Miller v. Georgia R. R. etc. Co.*, 170.
5. **REGULATION FOR UNLOADING FREIGHT-CARS — CONSTRUCTION.** — In construing a regulation of a common carrier for unloading freight-cars, and providing that the cars are to be placed and remain accessible to the consignee for the purpose of unloading, the course and exigencies of business are necessarily to be regarded; hence the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible, if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the consignee is ready to unload. *Miller v. Georgia R. R. etc. Co.*, 170.
6. **COMMON CARRIER CANNOT BY CONTRACT EXEMPT HIMSELF FROM LIABILITY FOR NEGLIGENCE.** — A common carrier of freight is liable for injuries thereto resulting from his negligence, notwithstanding he has, by special contract with the shipper, stipulated against liability, except for injuries caused by his fraud or gross negligence. *Johnson v. Alabama etc. R'y Co.*, 534.
7. **BURDEN OF PROOF ON CARRIER CLAIMING EXEMPTION WHAT.** — When a common carrier claims exemption from liability for injury to goods under a special contract, the burden of proof is upon him to show that the loss or damage resulted from one or more of the excepted causes in the contract, and without his fault. *Johnson v. Alabama etc. R'y Co.*, 534.
8. **LIABILITY FOR LOSS OF BAGGAGE BY FLOOD.** — A common carrier is not liable for the loss of baggage destroyed while in his possession by an unprecedented flood amounting to an act of God, such as the "Johnstown flood," in the absence of evidence of want of care on his part. *Long v. Pennsylvania R. R. Co.*, 732.
9. **CONNECTING CARRIERS, PRESUMPTION OF LOSS OF FREIGHT ON LINE OF LAST ONE.** — Where goods are shipped in cases over several lines of carriers, upon through bills of lading, and upon arrival at their destination one of the cases is missing, in an action to recover for the loss, brought against the last carrier, the burden is upon him to show that the loss did not occur on his line, even though he is an independent carrier, having no partnership connection with the others. The presumption that the loss occurred on the line of the last carrier is not overcome by proving that the car came under the seals of the preceding carrier, and that it had no end windows, it not appearing that the seals were sufficient to bar all access to the car, or that they remained unbroken throughout the journey, and it not being shown how, when, or where the case was

BONDS.

See **ESTOPPEL; MUNICIPAL CORPORATIONS, 25-30; SURETYSHIP, 1-3, 5, 6.**

BOOKS.

See **EVIDENCE, 11, 12.**

BORROWER AND LENDER.

See **PARTNERSHIP.**

BOUNDARIES.

1. BOUNDARIES — HIGHWAY OR STREET AS. — When an agreement for the purchase of land, at a certain price per acre, after a survey is made, calls for a street or highway as one of the boundaries, the purchaser is bound to pay for the land to the middle line of such street or highway, unless a contrary intention plainly appears. *Firmstone v. Spaeter*, 851.

2. BOUNDARY OF TOWN LOTS. — Purchasers of town lots have the right to locate their lot lines according to the stakes set by the plat of the lots, and no subsequent survey can unsettle such lines. The question afterwards is, not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is, whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case, they must govern, notwithstanding any errors in locating them. *Le Compt v. Lucders*, 450.

See **WATERCOURSES, 2, 3.**

BUILDING CONTRACTS.

See **ARBITRATION AND AWARD; CONTRACTS, 6-8.**

BURDEN OF PROOF.

See **BAILMENTS, 1; CARRIERS, 7, 9-11; FRAUD, 3; FRAUDULENT CONVEYANCES, 6; LIBEL, 5; MALICIOUS PROSECUTION, 5, 6, 15, 16; MISTAKE, 1; NEGLIGENCE, 7, 8, 16, 17; RAILROADS, 24; RAPE, 2.**

BURIAL-PLACES.

See **PLEADING, 1.**

CALLS.

See **WATERCOURSES, 3.**

CARRIERS.

1. CARRIERS OF PASSENGERS — STRICT DILIGENCE. — An instruction that the law requires strict diligence of carriers of passengers is not unjust to the carrier; for the law imposes upon carriers the duty of exercising the highest care, skill, and diligence in the transportation of passengers, and holds them responsible for the consequence of the slightest negligence resulting in injury to the persons sustaining that relation to them. *Alabama etc. R. R. Co. v. Hill*, 65.

2. COMMON CARRIER MAY ADOPT AND ENFORCE ANY REASONABLE REGULATION as between itself and its customers for the conduct of its business, the effect of which is the protection of the carrier and the benefit of the public. *Miller v. Georgia R. R. etc. Co.*, 170.

3. **REGULATIONS — ADOPTION OF.** — A common carrier, though a corporation, makes a regulation its own by adopting and acting upon it, irrespective of the source whence it is derived, and the fact that it was promulgated by a person or board of persons representing a combination of carriers does not impair its effect as a regulation of the carrier adopting it. *Miller v. Georgia R. R. etc. Co.*, 170.
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lost, and it appearing that one of the other cases had been somewhere recovered. *Faison v. Alabama etc. R'y Co.*, 576.

10. CONTRACT LIMITING LIABILITY—BURDEN OF PROOF.—When there is proof of the fact of injury to goods during transportation, but the manner of its occurrence does not import negligence on the part of the carrier, he is not liable, if his contract is for a limited liability only, unless there is proof of negligence as an inducing cause of the injury, and the burden of making such proof is upon the shipper. *Buck v. Pennsylvania R. R. Co.*, 800.

11. LIMITATION OF LIABILITY—BURDEN OF PROOF.—A common carrier of goods may limit his liability, except as against his own negligence; and his liability then depends upon proof of negligence in fact. If no explanation is given as to how an injury occurred, a presumption of negligence arises, justifying a recovery in cases where there is no other proof than of the delivery of the goods to the carrier in good condition, and their arrival at the point of destination in a damaged condition. *Buck v. Pennsylvania R. R. Co.*, 800.

See **BILLS OF LADING**; **NEGLIGENCE**, 6, 7, 16-18; **RAILROADS**.

CASHIER.

See **SURETYSHIP**, 10.

CHANGE OF GRADE.

See **MUNICIPAL CORPORATIONS**, 22.

CHARTERS.

See **CORPORATIONS**, 1; **MUNICIPAL CORPORATIONS**, 11.

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGES, AND CONFLICT OF LAWS.—A CHATTEL MORTGAGE EXECUTED IN ANOTHER STATE should be given such effect as it is entitled to in the state wherein it was executed. *Handley v. Harris*, 322.

2. CHATTEL MORTGAGES.—REMOVAL TO ANOTHER STATE OF PROPERTY which is subject to a chattel mortgage duly executed and recorded in the state where the property was situated when it was made does not destroy the lien, and the mortgage may be enforced against an innocent purchaser in the state to which the property was removed. The constructive notice imparted by the recording of the mortgage extends to wherever the property may be removed. *Handley v. Harris*, 322.

See **PARTNERSHIP**; **SURETYSHIP**, 8; **TRIAL**, 3.

CHECKS.

See **BANKS**, 5, 8, 9; **TRUSTS**, 5.

CHOSES IN ACTION.

See **JURISDICTION**, 2.

CITIES.

See **MUNICIPAL CORPORATIONS**.

COLLATERAL ATTACK.

See **JUDICIAL SALES**, 4.

remedied without difficulty, slight defects, caused by inadvertence or unintentional omissions, will not necessarily prevent a recovery of the contract price, less the amount, by way of damages, requisite to indemnify the owner for the expense of conforming the work to that for which he contracted. And whether or not there has been a substantial performance of the contract is usually a question of fact. *Crouch v. Gutmann*, 608.

7. **FORFEITURE FOR DEFICIENCY IN WORK DONE UNDER BUILDING CONTRACT CANNOT BE ASSERTED BY OWNER WHEN.** — When it is provided in a building contract that if the contractor shall at any time during the progress of the work refuse or neglect to supply a sufficiency of materials or workmen, the owner may, after notice, finish the work and deduct the expense incurred thereby from the amount of the contract price, and the owner avails himself of this privilege, he cannot assert a forfeiture in respect to the deficiency so supplied by him, but is simply entitled to deduct the expense incurred. *Crouch v. Gutmann*, 608.

8. **ARCHITECT'S CERTIFICATE, REFUSAL TO GIVE, UNREASONABLE WHEN.** — When, by the terms of a building contract, the architect's certificate is a condition precedent to a right to payment, and, after the work has been substantially completed, the architect refuses to give a certificate, his refusal is unreasonable, and the failure to obtain it will not bar a recovery by the contractor. *Crouch v. Gutmann*, 608.

EXECUTION — EXEMPTIONS. — A CONTRACT TO WAIVE ALL RIGHTS OF EXEMPTION FROM EXECUTION applies only to the exemption laws of the state wherein the contract was made, and does not deprive the debtor of the benefit of the exemption laws of another state in which he is sued. *Seay v. Palmer*, 57.

ATTORNEY'S FEE, STIPULATION FOR, IN USURIOUS CONTRACT FALLS WITH CONTRACT. — A stipulation in a usurious contract for the payment of an attorney's fee in case of litigation falls with the contract of which it is a part, and cannot be enforced. *American Freehold Land etc. Co. v. Jefferson*, 587.

ACCOUNTS; ARBITRATION AND AWARD; ATTACHMENT, 2; BAILMENTS, 3; BILLS OF LADING; CARRIERS, 6, 7, 10, 11; COURTS, 1; DAMAGES, 1, 2; EQUITY, 2, 3; FRAUDULENT CONVEYANCES, 4; HUSBAND AND WIFE, 2; INSURANCE, 1; INTEREST; JOINT LIABILITY; MARRIAGE AND DIVORCE; MASTER AND SERVANT, 1-4; MISTAKE; MUNICIPAL CORPORATIONS, 12; NEGOTIABLE INSTRUMENTS, 4; PLEADING, 2; RAILROADS, 26, 27; REAL PROPERTY, 3; SALES, 1-3, 5; SPECIFIC PERFORMANCE, 1, 3; STATUTES, 6; SURETYSHIP, 4, 9; TAXES, 3; TELEGRAPHS, 7; USURY.

CONTRACTORS.

See CONTRACTS, 6-8; ESTOPPEL; MECHANICS' LIENS, 2; REAL PROPERTY, 2.

CONTRIBUTION.

See JOINT LIABILITY.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, 7; NEGLIGENCE, 8-10, 14, 15; PARENT AND CHILD, 2; RAILROADS, 37, 38.

CONVERSION.

See DAMAGES, 3; PLEDGE; TROVER; TRUSTS, 6.

CONVEYANCES.

See DEEDS; INSURANCE, 4; WATERCOURSES, 2, 3.

CORPORATIONS.

1. **RESIDENCE OF.** — If different charters are granted for the same general business by different states to the same corporation, and an organization is properly effected under each charter, the corporation becomes a citizen of each state, and, as such, has the protection of and is amenable to its laws. *Railroad v. Barnhill*, 889.
2. **ULTRA VIRES — ESTOPPEL.** — When the stockholders in a corporation sign its articles of association with knowledge that the object of the corporation is to engage in a certain specified business in which it does engage, and it incurs liability for which it is sued, it cannot plead in defense that it has no authority under the law to engage in such business. *Carson City Sav. Bank v. Carson City Elevator Co.*, 454.
3. **ULTRA VIRES — ESTOPPEL.** — The plea of *ultra vires* should not prevail, as a general rule, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong. *Carson City Sav. Bank v. Carson City Elevator Co.*, 454.
4. **STOCK SUBSCRIPTION — LIABILITY OF PROMOTER ON PROMISE TO REFUND SUBSCRIPTION.** — When one is induced to subscribe for stock in a railway corporation by the promise of one of its promoters that if the railroad is not finished within a certain time the subscription shall be returned by the corporation, or in default thereof, by the promisor, such promise constitutes a contract of suretyship, and the consideration therefor is the subscription by the promisee to the stock of the corporation. *Allison v. Wood*, 726.
5. **CORPORATION CANNOT DISCRIMINATE BETWEEN BONA FIDE PURCHASERS OF ITS STOCK.** — In the absence of any discretionary power expressly reserved, a corporation or company whose stock is for sale in the open market has no right to so discriminate between *bona fide* purchasers thereof as to deny to some of them the right to make their title effectual for recognition by the company in the manner provided by it for that purpose, while allowing it to others. The right to perfect the transfer is, in such case, an apparent right incident to the purchase. *Rice v. Rockefeller*, 658.
6. **TRUST CERTIFICATE, ASSIGNEE OF, MAY COMPEL TRANSFER THEREOF ON BOOKS OF TRUSTEES.** — Where the stockholders of certain corporations and partnerships and certain individuals engaged in a certain enterprise create a trust whose object is to authorize the trustees to control and manage the business, trust certificates transferable on the books of the trustees, upon surrender of the certificates, are by the trustees issued to the parties to the agreement, and to their assignees, who are, by the terms of the agreement, the beneficiaries under the trust, the holder of such certificates being by their terms subject to all the terms of the agreement, and of the by-laws adopted in pursuance thereof, as fully as if he had signed the same, such certificates have on the back a blank form of transfer, by the terms of which the transferee is appointed attorney, with authority to make the necessary transfer upon the books of the trust, and such certificates are for sale in the open market, a person who purchases one of those certificates in the open market, taking from the person to whom it has been issued an assignment thereof in a duly formal manner, and demands that a transfer be made to him on it.

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books, and a new certificate issued to him, offering, upon compliance with his demand, to surrender the old certificate, may maintain an action to compel such transfer and the issuance to him of a new certificate. The quality of transferability given to the certificate imports the right to make it effectual by transfer on the books. *Rice v. Rockefeller*, 658.

7. **REFUSAL TO TRANSFER TRUST CERTIFICATE TO ASSIGNEE THEREOF NOT JUSTIFIED BY HIS HOSTILITY TO TRUST.** — In an action by an assignee of a certificate of a trust to compel the trustees to transfer it to him on the books of the trust, where the answer alleges and the trial court finds that the plaintiff was a competitor and rival of the parties to the trust agreement, and had been engaged in transactions and proceedings hostile to the trust and to them, this will not justify the refusal to make the transfer; and where it is not shown that the relief sought will be unjust or prejudicial to the legal rights of the defendants, the plaintiff's motive in seeking it is not legitimately a subject of consideration. *Rice v. Rockefeller*, 658.

See **ATTACHMENT**; **CARRIERS**, 3; **EVIDENCE**, 11; **MECHANICS' LIENS**, 1-4; **MUNICIPAL CORPORATIONS**; **NEGLIGENCE**, 13, 20; **PROCESS**.

COSTS.

See **MANDAMUS**; **MORTGAGES**, 7.

CO-TENANCY.

BONA FIDE ENCUMBRANCE OF CO-TENANT'S INTEREST, RIGHT OF. — The lien in favor of one co-tenant against the interest of another, which in the partition of lands held in common is allowed for what may be found due on an accounting between them touching the receipts and disbursements from and concerning the common estate, is not entitled to priority over a *bona fide* purchaser or encumbrancer of the interest of one of the co-tenants in the common estate. *Burne v. Dreyfus*, 539.

See **HOMESTEAD**; **PARTITION**; **PLEADING**, 1.

COUNSEL.

See **NEW TRIAL**; **TRIAL**, 11-13.

COUNTIES.

See **FALSE PRETENSES**, 2, 4, 6; **MUNICIPAL CORPORATIONS**, 27, 28.

COURTS.

1. **COMITY, PRINCIPLE OF, NOT EXTENDED TO ABROGATE SETTLED RULES BY WHICH COURTS ARE GUIDED.** — The principle of comity under which a contract, void where made, will not be enforced in the courts of another state, even though by the laws of such state the contract, if it had been made there, would have been a lawful one, is never so extended as to abrogate the settled and controlling rules by which the courts of the state whose comity is invoked are guided. *American Freehold Land etc. Co. v. Jefferson*, 587.
2. **JUDGMENT OF CIRCUIT COURT OF UNITED STATES, EFFECT TO BE GIVEN TO, IN STATE COURTS.** — State courts must give the same force and effect to a final judgment of the circuit court of the United States that they give to the judgments of the courts of their own state, and this, although had the action been brought in the state court, no judgment could have

been recovered therein. *Oceanic Steam Nav. Co. v. Compania Transatlantica Española*, 685.

See APPEAL; ELECTIONS, 7; INSOLVENCY, 1; JUDGMENTS, 7, 11; MUNICIPAL CORPORATIONS, 2, 3, 12, 26; TRIAL; USURY.

CRIME.

See MALICIOUS PROSECUTION, 1, 2.

CRIMINAL LAW.

See EVIDENCE, 4, 5; FALSE PRETENSES; FORGERY; LARCENY; MALICIOUS PROSECUTION, 4; PERJURY; RAPE; WITNESSES, 1.

CROSS-EXAMINATION.

See TRIAL, 3; WITNESSES.

DAMAGES.

1. **PROSPECTIVE PROFITS.** — In an action to recover for the breach of a contract for furnishing machinery and repairing a custom and manufacturing flouring-mill, the measure of damages is the fair rental value of the mill during the time the owner is deprived of its use after the expiration of the time for the performance of the contract; but prospective profits of such mill are too speculative to be considered as damages. *Hutchinson Mfg. Co. v. Pinch*, 463.
2. **DAMAGES FOR BREACH OF CONTRACT TO REPAIR MILL.** — In an action to recover for the breach of a contract to furnish machinery and repair a flouring-mill, the owner cannot recover for grain ground and poor flour manufactured to test the mill during the time when he knew that it was not in condition to do good work; but he may recover for his time lost and the amount paid his employees while lying idle by reason of the breach of the contract. *Hutchinson Mfg. Co. v. Pinch*, 463.
3. **MEASURE OF, FOR CONVERSION.** — If there is a wrongful conversion of stock by a pledgee, the proper measure of damages therefor is the value of the stock at the time of the conversion, with interest thereon from such time; but the jury may, in their discretion, if they think the justice of the case requires it, give the highest value of the stock at any time between the conversion and the trial. *Terry v. Birmingham Nat. Bank*, 87.
4. **WHAT PLAINTIFF WAS MAKING** at the time he received injuries, by which he was disabled for a considerable time, may be proved as an element of the damages he sustained. *Alabama etc. R. R. Co. v. Frasier*, 28.
5. **IMPAIRMENT OF PHYSICAL FUNCTIONS.** — The fact that plaintiff's injuries were of such a character as to render child-bearing perilous to her life is admissible in an action for compensation for personal injuries, though she is not and may never be married. It is to be assumed that every physical function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each of them. *Alabama etc. R. R. Co. v. Hill*, 65.
6. **DAMAGES FOR MENTAL SUFFERING** alone cannot be recovered in any case. *Chapman v. Western Union Tel. Co.*, 183.
7. **MEASURE OF DAMAGES FOR POLLUTING STREAM.** — In an action to recover damages to a farm, caused by the pollution of a stream running through it, it is error to admit evidence of the difference between the value of

the farm with the stream clear and its value with the stream polluted. But if the jury is instructed not to find, in any event, the difference in the value of the farm with an unpolluted and a polluted stream on it, and their verdict shows that they must have disregarded the incompetent evidence, the error will not be ground for reversal. *Mississippi Mills Co. v. Smith*, 546.

8. **EXEMPLARY** damages may be awarded, though the actual injury suffered was nominal. *Alabama etc. R. R. Co. v. Sellera*, 17.
 9. **EXEMPLARY DAMAGES ARE NOT RECOVERABLE FOR MERE NEGLIGENCE**. *Richmond etc. R. R. Co. v. Vance*, 41.
 10. **JURY TRIAL — EXEMPLARY DAMAGES.** — An instruction to a jury, that if they find from the evidence that vindictive damages should be given, they have the right to give such damages as the evidence authorizes, not beyond the amount claimed in the complaint, is a correct statement of the rule for the guidance of juries in the assessment of punitive damages. *Alabama etc. R. R. Co. v. Frazier*, 28.
 11. **NEGLECT — DUTY OF PERSON INJURED TO EMPLOY PHYSICIAN.** — A person injured by the negligence of another is not unqualifiedly bound to engage medical aid and attendance for such length of time as his injuries make necessary; but if a man of ordinary prudence would have engaged such aid and attendance more promptly than the injured party did, his delay in this regard may be taken into consideration, and compensation may be denied for damages which might have been so averted. *Vallo v. United States Express Co.*, 741.
- See ACTIONS**, 1, 2; **CONTRACTS**, 6; **EMINENT DOMAIN**; **INJUNCTIONS**, 2; **JOINT LIABILITY**; **JUDGMENTS**, 1; **LIBEL**, 7; **MASTER AND SERVANT**, 1-3; **MUNICIPAL CORPORATIONS**, 22, 25; **NEGLECT**, 1, 3, 4, 11; **PARENT AND CHILD**, 2; **RAILROADS**, 3, 9-17, 21, 28, 32; **SHIPPING**; **TELEGRAPH**, 1, 2, 8, 9; **TRIAL**, 4; **WATER COMPANIES**, 3; **WITNESSES**, 5.

DEATH.

See SURETYSHIP, 11.

DEBTOR AND CREDITOR.

1. **SUBROGATION, PERSON WHO ADVANCES MONEY TO DISCHARGE LIENS ENTITLED TO, WHEN.** — Where a debtor, by fraudulent representations, induces a person to advance money to pay off liens on the debtor's property to redeem the debtor's property from execution sale, and to release a judgment of his own against the debtor which was a lien on the debtor's property, such person will, as against the debtor, be subrogated to the rights of the persons whose liens his money discharged. *Baicker v. Pynn*, 231.
 2. **FRAUDULENT CONVEYANCES — PREFERRING CREDITORS — CONFESSION OF JUDGMENT.** — One who is in debt to different persons may give a preference to any one of them, by confessing a judgment in his favor. The fact of the other indebtedness weighs nothing against the validity of such preference. *Kitchen v. McCloskey*, 811.
- See ASSIGNMENT FOR BENEFIT OF CREDITORS**; **BANKS**, 5, 14; **CONTRACTS**, 5, 9; **EQUITY**, 3; **EVIDENCE**, 3; **EXECUTION**, 1, 2; **FRAUDULENT CONVEYANCES**, 9; **HOMESTEAD**; **INSOLVENCY**; **JUDGMENTS**, 2, 6, 8; **JUDICIAL SALES**, 1, 5; **LEGACY**, 1; **MORTGAGES**, 5, 10; **MUNICIPAL CORPORATIONS**, 26; **PARTNERSHIP**; **PLEDGE**; **SURETYSHIP**, 4, 7.

DECLARATIONS.

See PERJURY, 2.

DEEDS.

IRREGULARITY CURED BY STATUTE — RECORD AS EVIDENCE. — When the enactment of a statute cures any irregularity in the acknowledgment of a deed to land within the state, which has been previously executed in another state, the record of such deed, made prior to the enactment of the statute, is also cured and rendered valid, and either such record, or a properly certified copy thereof, is admissible in evidence. *Sumner v. Mitchell*, 106.

See ACKNOWLEDGMENT; EVIDENCE, 10; FRAUD, 1; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 1; MISTAKE, 4, 5; MORTGAGES, 8; PLEADING, 1; RAILROADS, 84; SURETYSHIP.

DEFINITIONS.

Appurtenance. *Badger Lumber Co. v. Marion Water Supply etc. Co.*, 301.

Bill of lading. *Van Etten v. Newton*, 630.

Expert witnesses. *McNally v. Colwell*, 494.

"Hangers." *McNally v. Colwell*, 494.

"In a pleasing manner." *Alabama etc. R. R. Co. v. Frasier*, 22.

"Johnstown flood." *Long v. Pennsylvania R. R. Co.*, 732.

Malice. *Lunsford v. Dietrich*, 79.

"Obtained." *Connor v. State*, 126.

"Palace horse-car." *Railroad v. Dies*, 871.

Parens patriæ. *Louisville etc. R'y Co. v. Blythe*, 599.

"Perils of the river." *Crescent Ins. Co. v. Vicksburg etc. Packet Co.*, 533.

Probable cause. *Lunsford v. Dietrich*, 79.

Proximate cause. *Railroad v. Kelly*, 902.

"Railway" and "railroads." *Rafferty v. Central Traction Co.*, 763.

"Running at large." *Julienne v. Mayor*, 526.

"Then and there." *Connor v. State*, 126.

Trespass. *Burns v. Kirkpatrick*, 485.

DELEGATION.

See MUNICIPAL CORPORATIONS, 2.

DELIVERY.

See FRAUDULENT CONVEYANCES, 6-8.

DEMAND.

See BAILMENTS, 1; REPLEVIN.

DEMURRAGE.

See SHIPPING.

DEMURRER.

See JUDGMENTS, 12; PLEADINGS.

DEPUTY.

See OFFICERS, 1.

DEVISE.

1. **PERPETUITIES.** — TRUST CREATED BY WILL IS NOT ILLEGAL as a restraint upon alienation, when a vested interest passes to the devisee, which he can sell or dispose of at pleasure, and it is only the time of enjoyment of the profits of the devise which is postponed. The mere fact that no time is fixed within which the power of sale must be exercised does not of itself create a perpetuity, as it must be exercised within a reasonable time; and this is especially so when it is competent, under the trust, for all parties in interest to unite at any time to defeat such power, and take the property discharged thereof. *Cooper's Estate*, 828.
2. **MARRIAGE, CONDITIONS IN RESTRAINT OF.** — There is a distinction between conditions in restraint of marriage annexed to testamentary dispositions, and restraints on marriage contained in the very terms of the limitation of the estate given. *Mann v. Jackson*, 358.
3. **MARRIAGE, RESTRAINT OF.** — A DEVISE of his home to the testator's daughter for her natural life, unless she shall be married, in which case her life estate shall cease, if the apparent purpose of the will appears not to be to restrain her from marriage, but merely to give her the use of a house until, from her marriage, she will probably have a home otherwise provided for her, is not against public policy, and on the marriage of the daughter, her life estate terminates. *Mann v. Jackson*, 358.

DIRECTORS.

See BANKS, 10-15.

DIRECTORY.

See STATUTES.

DISCHARGE.

See SURETYSHIP, 12.

DISCRIMINATION.

See CORPORATIONS, 5.

DISEASE.

See MASTER AND SERVANT, 6.

DISQUALIFICATION.

See JUDGES.

DOGS.

See ANIMALS.

DOMICILE.

See CORPORATIONS, 1.

DUE PROCESS OF LAW.

See MUNICIPAL CORPORATIONS, 14.

DURESS.

TO THREATEN ONE with a criminal prosecution or a civil action is not duress, when he is believed in good faith to be liable to such suit or prosecution. *Thorn v. Pinkham*, 335.

See NEGOTIABLE INSTRUMENTS, 2.

EASEMENTS.

See RAILROADS, 35.

EJECTMENT.

See EQUITY, 5; EVIDENCE, 12, 13; JUDGMENTS, 12.

ELECTION.

See JUDGMENTS, 2; LANDLORD AND TENANT, 1.

ELECTIONS.

1. **ELECTIONS, POWER OF LEGISLATURE TO PRESCRIBE MANNER OF HOLDING.** — It is within the power of the legislature to prescribe the manner of holding elections and the mode in which electors shall express their choice. *Parving v. Wimberg*, 254.
2. **ELECTION HELD AT TIME NOT AUTHORIZED BY LAW, VOID.** — The election of a person to an office held at a time which was not authorized by law is void. *Kimberlin v. State*, 208.
3. **AUSTRALIAN BALLOT, MODE IN WHICH IT MUST BE STAMPED.** — An elector voting under the Australian system must indicate his choice by stamping one of the squares of his ballot; he cannot stamp his ballot elsewhere, and leave the election board to guess at his intention. *Parving v. Wimberg*, 254.
4. **ELECTOR MUST VOTE IN MANNER PRESCRIBED BY LAW.** — Where the law requires an elector, in voting, to express his choice by stamping certain designated squares on the ballot, if he does not choose to indicate his choice in the manner prescribed, he cannot complain if his ballot is not counted. *Parving v. Wimberg*, 254.
5. **BALLOT NOT TO BE REJECTED BECAUSE INDORSED BY CLERK IN WRONG PLACE.** — The statute requiring the clerks of election to indorse their initials upon the ballots is mandatory, but the requirement that the initials shall be indorsed in a particular place on the back of the ballot is directory merely. A ballot indorsed at an improper place cannot therefore, for that reason only, be rejected. *Parving v. Wimberg*, 254.
6. **BALLOTS PLACED BY MISTAKE OF ELECTION OFFICER IN WRONG BOX MUST BE COUNTED.** — A ballot cannot be rejected in making the count because the election officers, by mistake, have placed it in the wrong box. *Parving v. Wimberg*, 254.
7. **CONSTRUCTION OF STATUTE ACCEPTED BY ELECTION OFFICERS NOT IGNORED BY COURTS, UNLESS PALPABLY WRONG.** — A construction of an election law that has been accepted and acted upon by the officers whose duty it is to administer the law will not be ignored by the courts, unless it is palpably wrong. *Parving v. Wimberg*, 254.
8. **MERE IRREGULARITIES OF ELECTION OFFICERS DO NOT VITIATE ELECTION.** — Mere irregularities on the part of election officers, or their omission to

observe some merely directory provision of the law, do not vitiate the election. *Parving v. Winberg*, 254.

See MUNICIPAL CORPORATIONS, 27, 28; OFFICERS, 2, 3; STATUTES, 2

ELECTRIC-LIGHT COMPANIES.

See MECHANICS' LIENS, 3, 4.

EMBEZZLEMENT.

See NEGOTIABLE INSTRUMENTS, 2.

EMINENT DOMAIN.

CONDEMNATION OF LAND OF MINOR NOT NECESSARY WHEN GUARDIAN AND COMPANY AGREE. — A statute providing that the guardian of any infant, *non compos*, or insane person may agree with a railroad company upon the damages to be paid for land of his ward taken by it, or release his ward's claim for damages, dispenses with the necessity for the condemnation of the land in cases where the guardian and the company can agree. *Louisville etc. R'y Co. v. Blythe*, 599.

ENTIRETY.

See INSURANCE, 1.

EQUITY.

1. **EQUITY ASSUMES JURISDICTION WHERE REMEDY AT LAW INADEQUATE.** — When the remedy at law is inadequate, equity will assume jurisdiction. *McAfee v. Reynolds*, 194.
 2. **VOID CONTRACT, EQUITABLE RELIEF AGAINST, DENIED, UNLESS COMPLAINANT SUBMITS TO DO EQUITY.** — Although a contract is void under the laws of this state, so that no action can be maintained for its breach, a court of equity will not relieve against it, unless the complainant will submit to do equity, regardless of the terms or of the invalidity of the contract. *American Freehold Land etc. Co. v. Jefferson*, 587.
 3. **RELIEF AGAINST USURIOUS CONTRACT — CONDITION UPON WHICH GRANTED IN EQUITY.** — Courts of equity in this state, when applied to by a debtor who seeks relief against a usurious contract governed by the laws of another state, will require the complainant to do equity by refunding or tendering with his bill the principal of the debt, with legal interest. *American Freehold Land etc. Co. v. Jefferson*, 587.
 4. **LIEN OF JUDGMENT PAID OFF KEPT ALIVE BY EQUITY WHEN.** — When the purchaser of land pays off a judgment for which he is not liable, with the manifest intention to keep the lien thereof alive, equity will preserve it for his protection and use for equitable purposes. *Boos v. Morgan*, 237.
 5. **JURISDICTION TO COMPEL SATISFACTION OF MORTGAGE.** — In an action of equitable ejectment, the common-law side of the court has no jurisdiction to compel the defendant therein to satisfy a mortgage for which he has received credit. The only remedy is by bill in equity. *German-American Title etc. Co. v. Shallcross*, 751.
- See ASSOCIATIONS, 3; BANKS, 1, 4; EVIDENCE, 12, 13; FRAUD, 1; FRAUDULENT CONVEYANCES, 1; JUDGMENTS, 13; JUDICIAL SALES, 5; LIENS, 1; MERGER, 2; MISTAKE, 2, 3; MORTGAGES, 7, 8; PLEADING, 2, 10; SPECIFIC PERFORMANCE.

ERASURE.

See SURETYSHIP, 3, 5.

ERROR.

See APPEAL; DAMAGES, 7; JUDGMENTS, 2, 11, 12; MISTAKE, 1; NEGLIGENCE, 9, 10; NEW TRIAL; PLEADING, 8; RAILROADS, 7, 22; REAL PROPERTY, 3; TRIAL.

ESTATES.

See DEVISE, 2, 3; FRAUDULENT CONVEYANCES, 3.

ESTOPPEL.

LACHES ON THE PART OF TAX-PAYERS OF A MUNICIPALITY in objecting to or resisting a public improvement, or the issuing of municipal bonds in aid of a railroad corporation, may estop them from afterwards denying liability for such improvement, if during their inaction a contractor or other person has incurred liabilities or made expenditures in good faith, or the bonds have passed into the hands of *bona fide* purchasers. *Hutchinson etc. R. R. Co. v. Commissioners*, 273.

See AGENCY, 1; CORPORATIONS, 2, 3; MUNICIPAL CORPORATIONS, 16, 27; RAILROADS, 27; SURETYSHIP, 1.

EVIDENCE.

1. **JUDICIAL NOTICE OF WHAT ELECTRICITY IS.** — The courts take judicial notice of electricity and of its nature, but not of the various methods of generating, transmitting, or using it. *Crawfordsville v. Braden*, 214.
2. **STATUTES OF SISTER STATE.** — Courts do not take judicial notice of the statutes of another state. They can be proved only by producing them, or a certified copy thereof, in evidence. *Sumner v. Mitchell*, 106.
3. **DECLARATIONS AND ADMISSIONS OF AN AGENT** as to past transactions do not bind his principal, and are not admissible as evidence against him. *Terry v. Birmingham Nat. Bank*, 87.
4. **CONFESSIONS ARE NOT ADMISSIBLE IN EVIDENCE** in criminal cases, when there is any reasonable ground to believe that they were induced by hope or fear. *Green v. State*, 167.
5. **CONFESSION AS EVIDENCE, WHEN NOT ADMISSIBLE.** — A confession of crime, made by a prisoner accused, to a sheriff and a third person, who is pecuniarily interested in his conviction, and which is induced by a remark made by such third person to the prisoner, that "if you know anything, it may be best for you to tell it," is not admissible in evidence, and if admitted, should, on the inducement appearing during the course of the trial, be withdrawn and excluded from the jury. *Green v. State*, 167.
6. **RAILROAD CORPORATIONS — ACCIDENT.** — [The testimony of a witness, that to the best of his judgment the rail broken was on a rotten cross-tie, but that he would not be positive, is admissible, because it is merely a statement of a fact according to the best of his recollection. *Alabama etc. R. R. Co. v. Hill*, 65.
7. **Plaintiff may be permitted to state that he was insisting "in a pleasing manner" that he be allowed to continue his journey, when an assault and battery upon him by a brakeman is attempted to be palliated or justified on the ground that an attack by the plaintiff on the brakeman was apprehended by the latter when he made such assault.** *Alabama etc. R. R. Co. v. Frazier*, 28.

8. **IN AN ACTION TO RECOVER FOR PERSONAL INJURIES**, in which the fact and extent of the injuries suffered by plaintiff are in issue, it is proper to admit evidence that plaintiff always had good health up to the time of the alleged injury, that her physical organs had performed their functions naturally and regularly, that afterwards she suffered great pain, could not sleep without opiates, nor walk any distance, and that her physical organs acted irregularly. *Alabama etc. R. R. Co. v. Hill*, 65.
9. **FIRES IN MILL—LIABILITY.**—In an action to recover for damages to surrounding property, caused by accidental fire in a saw-mill, evidence that one of the "hangers" in the boiler-room of such mill was charred by fire several years previously is irrelevant, and inadmissible to show negligence in the matter under consideration. *McNally v. Colwell*, 494.
10. **COPY OF RECORD OF DEED—OBJECTION, WHEN WAIVED.**—If the introduction of a certified copy of the record of a deed in evidence is not objected to on the ground that it has not been shown that the original is not within the custody or control of the party offering the copy, such objection will be deemed to have been waived. *Switzer v. Mitchell*, 196.
11. **BOOKS OF A PRIVATE CORPORATION** are not admissible as original evidence against third persons of facts therein stated, when the person who made the entries in such books is alive, and may be, but is not, called upon to testify concerning the facts detailed therein. *Terry v. Birmingham Nat. Bank*, 87.
12. **BOOKS OF A STOCK EXCHANGE** are not admissible against a pledgor for the purpose of showing that certain stocks were sold as directed by a power of attorney executed by him, the date of the sale, and the price realized, if the secretary who kept such books is still living, and might be, but is not, called to testify regarding the transaction, though the stock exchange was by the power of attorney constituted an agent of the pledgor for the purpose of making the sale. *Terry v. Birmingham Nat. Bank*, 87.
13. **JUDGMENT IN EQUITABLE EJECTMENT—EVIDENCE AS TO MATTERS LITIGATED.**—On the trial of a bill in equity to compel the satisfaction of a mortgage and judgment and the extinguishment of ground-rent, extrinsic evidence is admissible to prove that in a prior action of equitable ejectment between the same parties the defendant was given credit for such mortgage, judgment, and ground-rent, if the judgment therein is so general as not to show what particular matters were litigated. *German-American Title etc. Co. v. Shallcross*, 751.
14. **JUDGMENT—EVIDENCE TO SHOW WHAT WAS LITIGATED.**—When the record of a judgment in equitable ejectment is general, extrinsic evidence is admissible to prove what particular matters were litigated. *German-American Title etc. Co. v. Shallcross*, 751.
- See **ACTIONS**, 1; **ACKNOWLEDGMENT**, 3-6, 15; **APPEAL**, 1, 3-5; **BILLS OF LADING**, 1; **CARRIERS**, 8; **DAMAGES**, 7, 10; **DEEDS**; **FRAUDULENT CONVEYANCES**; **INSURANCE**, 7; **JUDGMENTS**, 1; **LABORER**, 1; **MALICIOUS PROSECUTION**, 7, 8, 15-17; **MASTER AND SERVANT**, 8; **MISTAKE**, 4, 5; **NEGLECT**, 1, 3, 8, 9; **PERJURY**; **RAILROADS**, 7-10, 13, 24, 32, 41, 42; **RAPE**, 1, 3; **SALES**, 2; **SEDUCTION**, 2; **TELEGRAPHER**, 3; **TRIAL**, 2-4, 6, 10; **WILLS**, 1-3; **WITNESSES**.

EXAMINATION.

See TRIAL, 14.

EXECUTION.

EXEMPTIONS. — DUTY OF OFFICER LEVYING UPON GOODS, any portion of which is exempt by law, is to have an inventory and appraisal made, and to permit the debtor to select, or, upon his neglect, to select for him, property to the amount allowed by law. Failing in this duty, the officer is liable to an action. *Hutchinson v. Whitmore*, 431.

1. EXEMPTION OF GRAIN FOR SUPPORT. — Under a statute exempting from execution grain, meat, vegetables, groceries, and other provisions on hand necessary for the support of the debtor and his family for one year, he is entitled only to the grain necessary for food of himself and family for that time, and is not entitled to hold as exempt an amount of grain sufficient, in the absence of other property, to support him and them for a year. *George v. Hunter*, 325.

2. EXEMPTION OF FARM TOOLS, WHO NOT ENTITLED TO. — A statute of exemption is construed with reference to the situation and vocation of the owners of property, and therefore a statute exempting from execution certain implements of agriculture will not entitle a merchant, part of whose stock in trade consists of such implements, to hold them, or any of them, as exempt from execution. *Files v. Stevens*, 333.

4. EXEMPTIONS — FARMERS. — Under a statute exempting from sale on execution the "tools, implements, materials, stock, apparatus, team, vehicle, horses, harness, or other things to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value \$250," a yearling steer, a heifer, two spring calves, and a quantity of hay, oats, corn, clover-seed, and cornstalks belonging to a farmer, are exempt to the statutory amount from levy on execution against him. *Hutchinson v. Whitmore*, 431.

See CONTRACTS, 9; DEBTOR AND CREDITOR; FRAUDULENT CONVEYANCES, 3; JUDGMENTS, 10; MECHANICS' LIENS, 1; REPLEVIN; TROVER, 2.

EXECUTORS AND ADMINISTRATORS.

See LEGACY, 2; MORTGAGES, 3, 8-10; SURETYSHIP, 11.

EXEMPTION.

See CONTRACTS, 9; EXECUTION; HOMESTEAD; TROVER, 2.

EXPERTS.

See WITNESSES, 3-7.

EXPRESS-MESSENGERS.

See MASTER AND SERVANT, 5; RAILROADS, 26.

EXPULSION.

See RAILROADS, 18.

FALSE PRETENSES.

1. CRIME OF, WHERE CONSUMMATED. — The receipt or obtaining of money or property obtained under false pretenses is the consummation of the offense; and if the false pretenses are made in one jurisdiction, but the

property is obtained in another, the prosecution must be instituted in the latter jurisdiction. *Connor v. State*, 126.

2. **INDICTMENT MUST ALLEGE WHERE PROPERTY WAS OBTAINED.** — An indictment for obtaining money by means of false pretenses which alleges that such pretenses were made in a certain county, but fails to state where the money was obtained, is insufficient. *Connor v. State*, 126.
3. **INDICTMENT MUST ALLEGE THAT PROPERTY WAS OBTAINED.** — An indictment for obtaining money under false pretenses, alleging that the person defrauded, or his agent, was, by reason of and in reliance upon the alleged false pretenses, induced to part with, and did part with, his ownership in such money, is insufficient, as not alleging that the money was "obtained" by or through such pretenses. *Connor v. State*, 126.
4. **AN INDICTMENT FOR OBTAINING MONEY** by means of false pretenses, alleged to have been made in a certain county, but failing to allege where the money was obtained, and stating, in another count, that the party defrauded, "then and there," relying upon such pretenses, and believing in their truth, was "then and there" induced to part with, and did part with, his ownership in such money, is insufficient for not alleging where the money was obtained, or that it was obtained in the jurisdiction where such pretenses were made. *Connor v. State*, 126.
5. **AN INDICTMENT FOR OBTAINING MONEY** by means of false pretenses, alleged to have been made in one or two places, followed by the use of the phrase "then and there" in charging the obtaining of the money, is insufficient and uncertain as to the jurisdictional locality where the money was obtained and the crime committed. *Connor v. State*, 126.
6. **INSUFFICIENT INDICTMENT NOT CURED BY STATUTE.** — An indictment for obtaining money by false pretenses, which is uncertain and insufficient for not alleging where the money was obtained, or that it was obtained in the county where the pretenses were made, is not cured by a statute providing that in all cases where an indictable offense is perpetrated within the state, and the same shall commence in one county and terminate in another, the person offending shall be liable to indictment in either county. *Connor v. State*, 126.

FALSE REPRESENTATIONS.

See FRAUD, 1; MORTGAGES, 1; NOTICE, 2; SURETYSHIP, 1.

FEEES.

See CONTRACTS, 10.

FELONY.

See MALICIOUS PROSECUTION, 1.

FENCES.

See REAL PROPERTY, 2.

FIGHTING.

See ACTIONS, 1.

FIRES.

See EVIDENCE, 9; NEGLIGENCE, 1-3; RAILROADS, 6; REAL PROPERTY, 4; WAREHOUSEMEN; WATER COMPANIES, 3; WITNESSES, 5.

FIXTURES.

CONDITIONAL SALE. — When a portable saw-mill is sold to the owner of an undivided interest in a farm, with permission to the vendee to take and use the mill thereon and in adjacent townships, the vendor retaining the title and right of possession until the mill is fully paid for, and the vendee, after making part payment, sets up the mill on his farm, bricking in and arching up the boiler, setting the engine in brick-work and bolting it thereto, roofing the engine and boiler, but leaving the mill and carriage uncovered, they do not thereby become fixtures so as to pass as such to a subsequent purchaser of the farm. After a refusal to pay the remainder of the purchase price, he is liable in trover for the mill. *Lansing Iron etc. Works v. Walker*, 488.

FORECLOSURE.

See MORTGAGES, 3, 5, 7, 8.

FORFEITURE.

See CONTRACTS, 7; MASTER AND SERVANT, 1, 2.

FORGERY.

INDICTMENT, WHAT MUST ALLEGE. — An indictment for uttering, publishing, and passing a false, forged, and counterfeit order for money, which fails to allege any person, firm, corporation, or company to or upon whom such order was uttered or passed, and fails to excuse this omission with any statement that the person to or upon whom it was uttered or passed was to the jurors unknown, is fatally defective. *Goodson v. State*, 125.

See NEGOTIABLE INSTRUMENTS, 4, 5.

FRANCHISES.

See MECHANICS' LIENS, 2, 4; RAILROADS, 44, 45, 47.

FRAUD.

1. **NEGLIGENT OMISSION TO READ DEED BEFORE SIGNING IT NOT BAR TO EQUITABLE RELIEF WHEN.** — Where an aunt, in whose affection and care for their welfare her nephews and niece confide, and her attorney, whom they know and respect, present to them for execution a deed of land, falsely representing to them that it is an instrument simply empowering her to collect the rents, when in fact it is a deed of bargain and sale conveying the land to her, and they, relying upon such representations, execute the deed without reading it, their omission to read the deed before signing it will not defeat their right to equitable relief, and to have the deed set aside. The law does not, in such a case, impute inexcusable negligence to an omission of vigilance and care which is procured by the fraud of the wrong-doer. *Smith v. Smith*, 617.
2. **NEGOTIABLE INSTRUMENTS. — NOTICE OF FRAUD** in the origin of a negotiable instrument is not inferable from negligence on the part of the holder, nor because facts existed which ought to have put him, as a prudent man, on his guard. *Breckenridge v. Lewis*, 353.
3. **TRUSTS — CLAIM OF TRUSTEE — BURDEN OF PROOF.** — When a claim is sought to be established by one holding a fiduciary relation to another, — as attorney and client, — against the person or estate which he is required to protect, the burden of establishing the claim, both as to its

fairness and consideration, is upon him in whom the confidence is reposed. He must show fully and clearly that the transaction was the free and intelligent act of his principal, fully explained to him, and this, irrespective of any admixture of deceit, imposition, overreaching, or other positive fraud. *Darlington's Estate*, 776.

4. **TRUSTS ARISING OUT OF CONFIDENTIAL RELATIONS** are not confined to any specific association of the parties to them. They extend to and embrace partners and copartners, principal and agent, master and servant, physician and patient, as well as trustee and *cestui que trust*, guardian and ward, parent and child, and husband and wife. *Darlington's Estate*, 776.

See **BANKS**, 10, 13; **CARRIERS**, 6; **CONTRACTS**, 4; **LARCENY**, 2; **MARRIAGE AND DIVORCE**; **MERGER**, 2; **MUNICIPAL CORPORATIONS**, 3; **NOTICE**.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT TRANSFER OF ENCUMBERED PROPERTY, CREDITORS ENTITLED TO RECOVER ONLY VALUE OF INTEREST TRANSFERRED.** — When personal property pledged to secure the payment of a valid debt is fraudulently transferred by the owner, his creditors are not, upon the setting aside of the transfer, entitled to recover from the fraudulent transferee the full value of the property, but only its value after deducting the amount of the debt. And however scandalous the fraud may be, a court of equity cannot, by way of punishment for his participation in the fraud, award judgment against him for a sum exceeding that value. *Hamilton Nat. Bank v. Halstead*, 693.
2. **CREDITORS NOT LIMITED TO PRICE RECEIVED BY FRAUDULENT TRANSFEREE WHEN.** — Where property fraudulently transferred is sold by the fraudulent transferee for less than its value, the creditors of the transferor are not limited in their recovery to the amount received for the property, but may recover its full value at the time of the transfer. *Hamilton Nat. Bank v. Halstead*, 693.
3. **FRAUDULENT CONVEYANCE, DEBTOR PROCURING, TO BE MADE TO ANOTHER ACQUIRES NO ESTATE THEREBY.** — A debtor who, being financially embarrassed, purchases land, and, for the purpose of hindering and delaying his creditors, takes the deed in the name of another person, has no legal estate in the property so conveyed which can be reached by execution, or which, on his death, will descend to his heirs; and if, after the death of such debtor, the person to whom the conveyance was made conveys the land to a third person, without consideration, except an oral agreement that in case any of the heirs of the deceased should turn up in distress, he will help them to the extent of one or two hundred dollars, such third person is not liable to the heirs of said deceased in an action brought against him by them for an accounting, and to compel him to pay to them the value of the land, less the sums paid by him for taxes and improvements. *Robertson v. Sayre*, 627.
4. **ENFORCEMENT OR.** — When a conveyance is executed to defraud creditors, and is without consideration as between the parties, the law will not aid either of them, but will leave them where they have put themselves, without relief. If the contract or conveyance is executory, it will not be enforced, and if executed, it will not be relieved against. If it has been performed in part, it will be given effect so far as executed, and held void so far as it remains unexecuted. *Williams v. Olm*, 442.

- 5. SALE — CHANGE OF POSSESSION.** — When there is not such a change of possession as will remove the presumption that the sale is fraudulent, it is still open to the purchaser to show that the sale was made in good faith, and without any intent to defraud creditors. *Hopkins v. Bishop*, 480.
- 6. SALE — TEMPORARY CHANGE OF POSSESSION — BURDEN OF PROOF.** — When a son sells a stock of goods to his father, notifying his clerk and creditors of the sale, and delivering the key of the store to the purchaser, there is in law a sufficient immediate delivery; but if the purchaser, who is not a merchant, does not remain in the store, and returns the key thereof to the vendor a few days after the sale, and employs him to sell the goods, so that, so far as outward appearances are concerned, the son is running the business after the sale the same as before, there is not such continued change of possession as will remove a presumption that the sale is fraudulent; and the burden of proof is upon the purchaser to show that it was *bona fide* and without intent to defraud creditors. *Hopkins v. Bishop*, 480.
- 7. SALE — CONTINUITY OF CHANGE OF POSSESSION.** — When a father purchases a stock of goods from his son, the purchaser need not remain in the store and personally manage the business, in order to constitute such change of possession as will make the sale valid against creditors of the vendor. He may employ an agent to manage the business, but he cannot select his vendor as such agent, unless something is done to give the public to understand that the possession of the vendor is the possession of the purchaser, and that there has been an open, visible, and substantial change in the possession of the goods. *Hopkins v. Bishop*, 480.
- 8. SALES — CHANGE OF POSSESSION — EMPLOYMENT OF VENDOR.** — When a son sells his father a stock of goods, and delivers the key of the store to him, there is in law a sufficient immediate delivery, and if the purchaser afterwards goes into the store and assumes the management, the mere fact that he employs the vendor to assist him in the business or its management will not militate against his actual and continued possession of the goods. *Hopkins v. Bishop*, 480.
- 9. CONFESSION OF JUDGMENT BY ONE BROTHER** in favor of another, for a debt justly due, does not raise a presumption of fraud as to other creditors. If fraud is alleged in such case, it must be clearly and distinctly proved. Trivial circumstances will not be considered as evidence of it. *Kitchen v. McCloskey*, 811.

See DEBTOR AND CREDITOR, 2; MORTGAGES, 5.

GARNISHMENT.

See ATTACHMENT.

GRANTS.

See WATERCOURSES, 2.

GRAVES.

See ACTIONS, 2; PLEADING, 1.

GROUND-RENT.

See EVIDENCE, 12.

GUARDIAN AND WARD.

See EMINENT DOMAIN; FRAUD, 4; LEGISLATURE, 2, 3; RAILROADS, 24.

HEIRS.

See ACTIONS, 2; FRAUDULENT CONVEYANCES, 3; PLEADING, 1, 9; SURETSHIP, 11.

HIGHWAYS.

1. USE OF STREET FOR MOVING HOUSE NOT ORDINARY USE. — The use of a street for the purpose of moving a house is not an ordinary and usual, but an extraordinary and unusual, use. *Williams v. Citizens' Ry Co.*, 201.
2. LIABILITY OF TOWNSHIP FOR DEFECT CONCURRING WITH EXTRAORDINARY CAUSE. — When, from extraordinary causes, for the existence of which township officers are not responsible, and of which they cannot be presumed to have had notice, a driver loses control of his horses, and they afterward come in contact with a defect in the highway, the township is not liable for the resultant injury or damage. *Schaeffer v. Jackson Township*, 792.
3. LIABILITY OF TOWNSHIP — NEGLIGENCE. — Where the proximate cause of an injury on a highway is the fright of a horse, and that fright is not caused by any defect in the highway, or by any neglect of duty on the part of the township officers, the township is not liable, although the injury is caused by the frightened horse running into a defect in the highway. *Schaeffer v. Jackson Township*, 792.
4. LIABILITY OF TOWNSHIP FOR NEGLIGENCE. — When the negligence of a township in allowing a highway to remain out of repair concurs with an extraordinary outside cause in producing an injury, the township is not liable, but the concurrence of an ordinary outside cause with such negligence will not so relieve it. *Schaeffer v. Jackson Township*, 792.
5. TO RENDER TOWNSHIP liable for injury caused by defects in a public highway, such defect must have been the sole efficient cause of the injury. *Schaeffer v. Jackson Township*, 792.

See BOUNDARIES, 1; MUNICIPAL CORPORATIONS, 22, 23; STREETS.

HIRING.

See MASTER AND SERVANT.

HOMESTEAD.

1. HOMESTEAD OF TENANT IN COMMON, CO-TENANT'S CONSENT NOT NECESSARY TO EXISTENCE OF. — A debtor occupying land as a tenant in common may have a homestead exemption therein, and, as against creditors, his co-tenant's consent to such occupancy is not essential. *Lewis v. White*, 557.
2. HOMESTEAD EXEMPTION OF TENANT IN COMMON, EXTENT OF. — The claim to the homestead exemption in property held in common is regulated and bounded in extent and value, just as in other cases. The tenant in common has no floating claim to exemption in the entire estate. He is protected in his occupancy of a homestead of proper quantity and value, but no further, and whatever interest he may have in the remainder of the common property may be seized and sold to satisfy the demands of his creditors in proper cases. *Lewis v. White*, 557.

See INSURANCE, 4.

HOUSE-MOVING.

See HIGHWAYS; INJUNCTIONS, 1.

HUSBAND AND WIFE.

1. **DEED TO HUSBAND AND WIFE JOINTLY.** — When a conveyance is made to husband and wife jointly, a purchaser of the husband's interest takes nothing during the life of the wife, and not even at her death, if the husband predeceases her. *Boyetown Nat. Bank v. Hartman*, 759.
 2. **CONFLICT OF LAWS — MARRIED WOMAN'S BOND AND MORTGAGE GOVERNED BY THE LEX REI SITÆ.** — A married woman's bond and mortgage for the purchase price of land situated in one state, executed, delivered, and to be performed in that state, and upon which, according to its laws, she is liable notwithstanding her coverture, will be construed in the courts of another state, so as to secure to her the advantages and enforce against her the obligation of her contract, in accordance with the laws of the state where it was executed and delivered. *Baum v. Birchall*, 797.
- See FRAUD, 4; INSURANCE, 4, 7; MARRIAGE AND DIVORCE; MISTAKE, 4; WITNESSES, 2, 8.

IMPEACHMENT.

See TRIAL, 8.

INCORPORATION.

See MUNICIPAL CORPORATIONS, 1, 2.

INDEMNITY.

See JOINT LIABILITY.

INDICTMENT.

See FALSE PRETENSES, 2-6; FORGERY; LARCENY, 1, 2.

INDORSEMENT.

See BANKS, 2-4; NEGOTIABLE INSTRUMENTS, 2, 4, 5, 7.

INFANTS.

See EMINENT DOMAIN, 1; MASTER AND SERVANT, 1; PARENT AND CHILD, 2.

INHERITANCE.

See FRAUDULENT CONVEYANCES, 3.

INJUNCTION.

1. **MOVING HOUSE ACROSS STREET-RAILWAY TRACK ENJOINED WHEN.** — When the moving of a house across the track of an electric street-railway necessitates the stoppage of traffic for many hours, and the cutting or destruction of the wires, such moving may be restrained by the courts, even though the common council of the city has failed or refused to take any steps to prevent such injury or destruction. *Williams v. Citizens' R'y Co.*, 201.
2. **INJUNCTION, DAMAGES ALLOWED UPON DISSOLUTION OF.** — When an injunction to restrain the sale of land under a trust deed is dissolved, the party enjoined is entitled to the statutory damages allowed by the code. *Burns v. Dreyfus*, 539.

See ACTIONS, 2.

INSANE PERSONS.

See EMINENT DOMAIN.

INSOLVENCY.

1. CONSTITUTIONAL LAW. — DISCHARGE BY A STATE COURT of an insolvent from his debts cannot affect a creditor who was a non-resident of the state when the insolvency proceedings were begun, though he was a resident thereof when the debt was contracted, unless he proved his claim in the insolvency court, or otherwise appeared therein. Because the insolvency court did not have jurisdiction over him, it could not discharge his right of action to recover his debt. *Pullen v. Hillman*, 340.
2. JUDGMENT OBTAINED PENDING PROCEEDINGS IN BANKRUPTCY upon a debt provable therein is barred by the subsequent discharge of the judgment debtor in such bankruptcy proceedings. *Lochner v. Stewart*, 887.

See BANKER, 5; JURISDICTION, 1; LANDLORD AND TENANT.

INSTRUCTIONS.

See APPEAL, 4; CARRIERS, 1; DAMAGES, 7, 10; LARCENY, 2; MISTAKE, 1; NEGLIGENCE, 9, 10; NEW TRIAL; PERJURY, 3; REAL PROPERTY, 3; TRIAL, 5-10.

INSURANCE.

1. ENTIRETY OF. — If insurance is effected upon real and personal property by a policy showing the amount for which each is insured, and that the premium is a gross sum, the contract is divisible, and the mortgaging of the personal property without the consent of the insurer cannot avoid the policy as to the real estate. *German Ins. Co. v. York*, 313.
2. USE OF PREMISES. — One brief violation of the terms of a policy of fire insurance for necessary work incidental to the preservation of the insured property will not be considered a breach of a condition prescribing the use of the premises. *Krug v. German etc. Ins. Co.*, 729.
3. USE OF PREMISES — BREACH OF CONDITION. — When a policy of fire insurance on a canning factory and the goods therein provides that the premises shall not be used for any other purpose than storage, the building of a fire in the furnace under the engine, on the insured property, for the purpose of emptying the boiler and pipes therein, to prevent their freezing during the winter, is not such a breach of the condition as will avoid the policy in case the property is destroyed as the result of building such fire. *Krug v. German etc. Ins. Co.*, 729.
4. INSURANCE. — CONVEYANCE OF HOMESTEAD MADE BY A HUSBAND ALONE, and which is therefore void, cannot affect a policy of insurance. *German Ins. v. York*, 313.
5. NOTICE OF SALE AND MORTGAGE. — Notice of the sale of the property insured, and the assent of the insurer thereto, together with notice to the local agent of a mortgage taken to secure the payment of a portion of the purchase price, is sufficient to operate as an assent on the part of the insurer to the giving of the mortgage, though the policy of insurance contains a provision that if the property shall be thereafter mortgaged without the consent of the company being indorsed thereon, it shall become null and void, and that no agent shall have power to alter or

change the terms of the policy, or make any indorsement thereon. *German Ins. Co. v. York*, 313.

MARINE INSURANCE — "PERILS OF THE RIVER" WITHIN TERMS OF POLICY OF. — Injury to cotton which is wet by being thrown from the deck into the river by the sudden careening of a steamboat is a peril of the river within the meaning of a policy of marine insurance, notwithstanding the careening of the boat may have resulted from the negligence or unskillfulness of those engaged in unloading her. To relieve from liability because of acts of the master or crew, there must be want of good faith and honesty of purpose. *Crescent Ins. Co. v. Vicksburg etc. Packet Co.*, 537.

7. DISCLOSURE OF TITLE — HUSBAND AND WIFE — EVIDENCE TO SHOW AGENCY. — When a policy of fire insurance provides that it shall be void if the interest of the insured is not truly stated therein, and it is taken out upon property of a wife in the name of her husband, without notice to the insurer of her ownership, she cannot recover for the loss in her own name; nor is evidence admissible, in such case, to show that the husband was acting as her agent when he procured the insurance, in the absence of an offer to reform the policy or to show that the insurer knew of the agency. *Diffenbaugh v. Union Fire Ins. Co.*, 805.

See ASSOCIATIONS.

INTEREST.

THE ALLOWANCE OF INTEREST on an amount due upon a contract rests within the sound discretion of the chancellor, in Tennessee, and the supreme court, on appeal, will not interfere. *Cole Mfg. Co. v. Collier*, 808.

See EQUITY, 2.

INTERMENT.

See PLEADING, 1.

INTERSTATE COMMERCE.

SALE OF LIQUORS IS NOT IN THE ORIGINAL PACKAGES when the purchaser retains the right to examine the liquors in such packages and to return them if not satisfactory, because, under such circumstances, the sale cannot be completed until the packages are broken and the liquors sampled. *Wassenaar v. Boulter*, 344.

See SALES.

INTOXICATING LIQUORS.

See INTERSTATE COMMERCE; NEGLIGENCE, 1.

INVENTORY.

See EXECUTION, 1; MORTGAGES, 2.

JOINDER.

See PLEADING, 2.

JOINT LIABILITY.

PARTY COMPELLED TO PAY DAMAGES FOR ANOTHER'S NEGLIGENCE ENTITLED TO INDEMNITY. — A person who, without fault on his own part, has been compelled, by a judgment of a court having jurisdiction, to pay damages

occasioned by the negligence of another is entitled to indemnity from the latter, whether contractual relations exist between them or not; and the right to such indemnity does not depend upon the fact that the wrong-doer owed to the party charged with the liability a special or particular duty not to be negligent. *Oceanic Steam Nav. Co. v. Compania Transatlantica Española*, 685.

See JUDGMENTS, 2; LIBEL, 2.

JUDGES.

1. **DISQUALIFICATION — WHAT DOES NOT DISQUALIFY.** — It is not a disqualification *per se* to try an indictment for perjury that the presiding judge is the same who presided at the trial in which the alleged perjury was committed, and also at the trial of another witness for perjury, who testified in the first case. Nor does any disqualification result from the fact that such judge is convinced of the guilt of the accused from facts coming to his knowledge during the course of the previous trials. *Heflin v. State*, 147.
2. **DISQUALIFICATIONS — WHAT DOES NOT DISQUALIFY.** — A judge is not *per se* disqualified to preside on the trial of an indictment for perjury because he is convinced of the guilt of the accused, and has privately and unofficially advised the prisoner's counsel to induce his client to plead guilty. *Heflin v. State*, 147.

JUDGMENTS.

1. **JUDGMENT FOR DAMAGES FOR NEGLIGENCE, HOW FAR CONCLUSIVE IN ACTION TO RECOVER AMOUNT PAID PURSUANT THERETO.** — In an action brought to recover the amount which the plaintiff has been compelled by the judgment of a court having jurisdiction to pay for the alleged negligence of the defendant, the judgment in the first action is proof, in the second action, of the liability, and the amount thereof, of the defendant in the first action to the plaintiff therein, where notice of that action and an opportunity to defend it were given to the wrong-doer, but it is not conclusive evidence of the liability of the defendant in the second action to the defendant in the first action. Such liability must be established by evidence outside of the record in the first action. *Oceanic Steam Nav. Co. v. Compania Transatlantica Española*, 685.
2. **JUDGMENT AGAINST ONE OF SEVERAL JOINT DEBTORS, WHEN NOT BAR TO ACTION AGAINST THE OTHERS.** — The common-law rule that a judgment against one of several joint debtors is a bar to an action against the others rests upon the idea of an election by the creditor to take such a judgment, in which case the extinguishment of his cause of action by the recovery of the judgment is presumed to have been intended by him; but this rule has no application to a case in which, without the consent and in spite of the opposition of the creditor, a judgment against all the joint debtors is vacated by the court as to one of them, who is let in to contest his liability. In such a case, the debtor let in to answer cannot set up the judgment against the other debtors as a bar, and it is error to dismiss the complaint on the ground that the debt has been merged in the judgment. *Heckemann v. Young*, 655.
3. **JUDGMENT LIEN, ACTION TO HAVE SUPERIORITY OF, DECLARED, MAINTAINABLE.** — One who holds a judgment which is a lien upon real estate may maintain an action to have his lien declared superior to a claim asserted to be superior to it. *McAfee v. Reynolds*, 194.

4. **JUDGMENT LIEN NOT ENFORCEABLE AFTER ITS EXPIRATION PENDING SUIT.** — The lien of a judgment which expires pending suit cannot be enforced against an inferior lien, although the suit was commenced before it expired. *McAfee v. Reynolds*, 194.
 5. **LAPSE OF TIME BETWEEN BRINGING SUIT AND DECISION CANNOT DEFEAT ACTION.** — The lapse of time between the bringing of a suit and the rendering of a decision cannot operate to defeat the plaintiff's cause of action, where he has been guilty of no laches in its prosecution. *McAfee v. Reynolds*, 194.
 6. **LIEN OF JUDGMENT NOT AFFECTED BY LAPSE OF TIME DURING WHICH CREDITOR'S HANDS TIED.** — The time during which the hands of a judgment creditor are tied by a statutory provision restraining proceedings to enforce the judgment for the period of one year after the death of the debtor cannot be considered in computing the time during which the lien of the judgment continues in force. *McAfee v. Reynolds*, 194.
 7. **LIEN OF JUDGMENT FIXED BY STATUTE CANNOT BE PROLONGED BY COURT.** — The lien of a judgment which is created and limited by statute cannot be prolonged by the courts beyond the period fixed by the legislature. *McAfee v. Reynolds*, 194.
 8. **SATISFACTION OF JUDGMENT, ENTRY OF, EQUIVALENT TO PAYMENT WHEN.** — Where a judgment creditor buys at his own sale, his entry of satisfaction of the judgment is equivalent to payment in money. *Boos v. Morgan*, 237.
 9. **LEVY, HOW FAR SATISFACTION OF JUDGMENT.** — A levy is *prima facie* a satisfaction of the judgment to the extent of the value of the property levied upon. *Boos v. Morgan*, 237.
 10. **JUDGMENT EXTINGUISHED BY SALE WHEN.** — The sale of land under execution and the payment of the bid, when it is sufficient to satisfy the amount due, extinguish the judgment. *Boos v. Morgan*, 237.
 11. **JUDGMENT NOT VOID CANNOT BE VACATED BY SAME COURT AT SUBSEQUENT TERM.** — Unless a judgment is void, it cannot, at a subsequent term, be vacated or reversed by the court that rendered it. For mere irregularities or errors of law, the appellate court alone can reverse or annul a judgment after the term at which it is rendered. *Alabama etc. Ry Co. v. Bolding*, 541.
 12. **MOTION TO VACATE JUDGMENT, ERRORS NOT CONSIDERED UPON.** — Upon a motion to vacate a judgment made at a subsequent term, the sufficiency of the declaration on a demurrer, or of the return of the summons on its face, and the action of the court in allowing a judgment of default to be set aside, the sheriff's return to be amended, and judgment by default to be again taken, and a writ of inquiry to be then immediately executed and followed by judgment final, will not be considered, since all these matters involve a question of error or not, and not of jurisdiction. *Alabama etc. Ry Co. v. Bolding*, 541.
 13. **JUDGMENT IN EQUITABLE EJECTMENT IS CONCLUSIVE NOT ONLY** as to the title of the land in suit, but it has all the conclusiveness of a decree in chancery as to every other matter litigated in that action. *German-American Title etc. Co. v. Shallcross*, 751.
- See AGENCY, 2; APPEAL, 7; COURTS, 2; DEBTOR AND CREDITOR, 2; EQUITY, 4; EVIDENCE, 12, 13; FRAUDULENT CONVEYANCES, 1, 9; INSOLVENCY, 2; JUDICIAL SALES, 1, 5, 6; LIMITATIONS OF ACTIONS, 1, 2; PROCESS; SCIRE FACIAS.

JUDICIAL NOTICE.

See EVIDENCE, 1, 2.

JUDICIAL SALES.

1. JUDGMENT CREDITOR BUYING AT HIS OWN SALE NOT BONA FIDE PURCHASER. — A judgment creditor who purchases at his own sale is chargeable with notice of all irregularities, for he is not a *bona fide* purchaser. *Boos v. Morgan*, 237.
2. COMPUTATION OF TIME WITHIN WHICH REDEMPTION CAN BE MADE. — In computing the time within which redemption from a sheriff's sale can be made, the day of the sale must be excluded. *Backer v. Pyme*, 231.
3. SHERIFF'S SALE MERELY IRREGULAR NOT COLLATERALLY ATTACKABLE. — A sheriff's sale which is merely irregular cannot be attacked collaterally. *Boos v. Morgan*, 237.
4. SHERIFF'S SALE — LAND RETAINED BY DEBTOR TO BE SOLD BEFORE THAT ALIENED. — Land subject to the lien of a judgment must be sold in the inverse order of its alienation, commencing with that remaining in the judgment debtor, and going next to that last sold by him, and one who has purchased land from the judgment debtor while it was subject to the lien of the judgment may, by a timely and appropriate application to a court of equity, compel the sheriff to first sell the land remaining in the hands of the debtor and the lands sold by him in the inverse order of their sale. *Boos v. Morgan*, 237.
5. SALE ON SATISFIED JUDGMENT VOID. — A sheriff's sale upon a satisfied judgment is void. *Boos v. Morgan*, 237.

JURISDICTION.

1. INSOLVENCY. — JURISDICTION OF A STATE COURT TO DISCHARGE A CITIZEN OF THE STATE FROM HIS OBLIGATION TO A CITIZEN OF ANOTHER STATE, when the latter has not in any way submitted himself or his claim to such court, cannot exist, though the contract was made and was to be performed in the state in which the debtor resides, and the obligee was also a citizen of the state when the obligation was contracted. *Pullen v. Hillman*, 340.
 2. CONFLICT OF LAWS. — CHOSES IN ACTION have no *situs*, and follow the person of the creditor, and cannot be discharged by a court which has no jurisdiction over his person; and it cannot have such jurisdiction, unless, at the beginning of the proceedings, process could have been served on him within the state. *Pullen v. Hillman*, 340.
- See EQUITY, 1, 5; FALSE PRETENSES, 1, 2, 4-6; INSOLVENCY, 1; JUDGMENTS, 12; RAPE, 2; SPECIFIC PERFORMANCE, 2.

JURY AND JURORS.

See APPEAL, 4; TRIAL.

JUSTICE OF THE PEACE.

See MALICIOUS PROSECUTION, 12.

LACHES.

See ESTOPPEL; JUDGMENTS, 5.

LANDLORD AND TENANT.

1. **INSOLVENCY — LEASES.** — AN ASSIGNEE IN INSOLVENCY may elect to accept a lease in favor of the insolvent, but, in the absence of such election, he has no estate in the leased property. He may be required, within a reasonable time, at the instance of the insolvent, to elect whether or not he will accept the estate as lessee. *Rodick v. Bunker*, 364.
2. **INSOLVENCY — LEASES.** — A DISCHARGE in insolvency does not relieve a lessee from the payment of rent accruing subsequently to the assignment, in the absence of statutory provision to that effect. *Rodick v. Bunker*, 364.

LARCENY.

1. **INDICTMENT — EVIDENCE OF RETURN IN OPEN COURT.** — It is essential to the validity of an indictment that the records of the court show affirmatively, that it was returned or filed in open court. The bare title of a case, accompanied only by the technical name of a crime appearing in the minutes of a court, is not sufficient evidence to show that an indictment was so filed or returned, and when the presentment and filing of an indictment is supported by such evidence alone, it may be defeated by plea in abatement. *Goodson v. State*, 135.
2. **LARCENY** involves felonious intent, and fraud or secretiveness in its effectuation. Therefore, an instruction that larceny is ordinarily the taking and removing, by trespass, of personal property which the trespasser knows belongs to another, with intent to deprive him of his property, is rightfully refused. *Lunsford v. Dietrich*, 79.
3. **LARCENY BY FALSE PERSONATION — INDICTMENT, WHEN INSUFFICIENT.** — An indictment for larceny in procuring property by falsely personating another, which fails to allege that the property fraudulently obtained was obtained by the party from whom it was obtained to be delivered to the party alleged to have been falsely personated, and which also fails to allege that the property was received by the defendant with intent to convert it to his own use, is fatally defective. *Goodson v. State*, 135.

LAW OF PLACE

See CONFLICT OF LAWS; CONTRACTS, 2, 3, 5.

LEASE

See LANDLORD AND TENANT; RAILROADS, 44, 45, 47.

LEGACY.

1. **WILLS.** — A LEGACY IS SUBJECT TO AN EQUITABLE LIEN OR RIGHT OF SET-OFF in favor of the estate of the testator for all debts owing from the legatee to the testator at the time of the latter's death, and such lien or right of set-off is paramount to any lien or right which can be acquired by any assignee or creditor of the legatee. *Irvine v. Palmer*, 893.
2. **EXECUTORS AND LEGATEES.** — IF A LEGATEE IS INDEBTED TO THE TESTATOR, the executor may retain the legacy either in part or full payment of the debt, by way of set-off. *Irvine v. Palmer*, 893.

See MORTGAGES, 8-10; PARENT AND CHILD, 1; TRUSTS, 1.

LEGISLATURE

1. **POLICE POWER OF STATE, DELEGATION OF, TO MUNICIPAL CORPORATIONS.** — Although the police power primarily inheres in the state, the legislature

may delegate a large measure of it to municipal corporations; and the power thus delegated may be conferred in express terms, or it may be inferred from the mere fact of the creation of the corporation. *Crossfordsville v. Braden*, 214.

2. **CONSTITUTIONAL LAW — POWER OF LEGISLATURE TO AUTHORIZE GUARDIAN TO CONVEY WARD'S LANDS.** — The legislature has power to confer upon guardians the authority to convey to a railroad company the right of way over the lands of their wards. The power resides in it, as *patria potestas*, to prescribe such rules and regulations as may be proper for the management, superintendence, and disposition of the property of persons under disability. *Louisville etc. R'y Co. v. Blythe*, 599.
3. **ENACTMENT OF LAW AUTHORIZING GUARDIAN TO CONVEY WARD'S LAND NOT EXERCISE OF JUDICIAL POWER.** — The enactment of laws authorizing guardians to convey the lands of their wards is not the exercise of judicial power by the legislature. Nor are such laws unconstitutional because they do not provide for notice to the ward whose land is conveyed. *Louisville etc. R'y Co. v. Blythe*, 599.

See **ACKNOWLEDGMENT**, 15, 16; **ELECTIONS**, 1; **JUDGMENTS**, 7; **MUNICIPAL CORPORATIONS**, 9; **RAILROADS**, 1; **STATUTES**.

LETTERS.

See **LIBEL**, 6; **MALICIOUS PROSECUTION**, 7; **WILLS**, 1-3.

LEVY.

See **EXECUTION**; **JUDGMENTS**, 9.

LIBEL.

1. **PUBLICATION OF FALSE PROTEST BY NOTARY PUBLIC.** — The protest, by a notary public, of a draft for non-acceptance, before due presentment for payment, is unauthorized, and its publication is a libel, for which the notary is liable in an action by the acceptor, who alleges that the protest and its publication were falsely, fraudulently, and maliciously made, and calculated to injure him in his credit and business. *May v. Jones*, 154.
2. **BANKS — LIABILITY FOR MALICIOUS PROTEST OF DRAFT BY NOTARY PUBLIC.** — A bank is not generally liable for the negligence or misconduct of a notary public employed by it to protest negotiable paper in his official capacity. To render the bank liable as a joint tort-feasor with a notary public for negligently and maliciously procuring the latter to make a false protest of a draft, the malice of the bank in the transaction must be specially alleged and proved. *May v. Jones*, 154.
3. **PUBLICATION OF, COMPLETE WHEN.** — Where a person, to whom a claim is presented by attorneys in behalf of their client, in replying, exceeds his privilege by sending to the attorneys a letter containing defamatory statements concerning the client, the publication is complete when the libelous letter is received and read by the attorneys. *Alabama etc. R'y Co. v. Brooks*, 528.
4. **QUALIFIED PRIVILEGE OF PERSON APPLIED TO FOR INFORMATION.** — A person to whom application is made for information may, within the limits thereof, write or speak words which, under other circumstances, would subject him to a suit for libel or slander, but the scope of the defamatory matter must not exceed the exigency of the occasion. And he cannot take license from the occasion to gratify his malice, or to state as

facts libelous matter which he does not believe to be true. *Alabama etc. Ry Co. v. Brooks*, 528.

5. MALICE, BURDEN OF PROOF OF, ON PLAINTIFF, WHEN COMMUNICATION PRIVILEGED. — In an action for libel, if the communication was privileged, the burden of proving malice is upon the plaintiff, who must offer some evidence of its existence beyond the mere falsity of the charge. *Alabama etc. Ry Co. v. Brooks*, 528.

6. MOTIVE FOR MAKING LIBELOUS STATEMENT QUESTION FOR JURY. — In an action of libel for writing a letter containing libelous statements, the question whether the writer believed the truth of the statements is for the jury, and his assertion is not conclusive of what the motive was. *Alabama etc. Ry Co. v. Brooks*, 528.

7. RAILROAD COMPANY LIABLE FOR ITS SUPERINTENDENT'S ACT IN WRITING WHEN. — A railroad company is liable for a libelous letter written by its superintendent in answer to a claim for damages presented to the company, where the writing of such letter is within the scope of his authority. *Alabama etc. Ry Co. v. Brooks*, 528.

LICENSE

See MUNICIPAL CORPORATIONS, 12.

LIENS

1. LIEN KEPT ALIVE WHERE EQUITY REQUIRES IT. — A lien will be kept alive where equity requires it, and the parties intended that it should not be extinguished. *Backer v. Pyne*, 231.

2. VOLUNTEER, ONE WHO ADVANCES MONEY TO PAY OFF LIENS IS NOT. — A person who, in order to protect his own interest, advances money to pay off liens, is not a volunteer. *Backer v. Pyne*, 231.

See BANKS, 5; CHATTEL MORTGAGES; CO-TENANCY; DEBTOR AND CREDITOR; EQUITY, 4; JUDGMENTS, 3, 4-7; JUDICIAL SALES, 5; LEGACY, 1; MECHANICS' LIENS; MORTGAGES, 1, 6, 7, 9, 10; SURETYSHIP, 4.

LIMITATIONS OF ACTIONS.

1. JUDGMENTS. — IF AN ACTION IS BROUGHT IN ONE STATE upon a judgment rendered in another, the statute of limitations of the former state must control. *Rice v. Moore*, 318.

2. JUDGMENTS. — THE REVIVOR OF A JUDGMENT in the state in which it was rendered, without personal service on the defendant or the entry of his appearance, cannot prevent the operation against such judgment of the statute of limitations of another state, in which the defendant resided at the time of such revivor, and in which an action is thereafter attempted to be maintained against him. The running of such statute must be computed from the original entry of the judgment, if, during all the time thereafter, the defendant was personally present within the state in which he is sued upon the judgment. *Rice v. Moore*, 318.

3. BANKS AND BANKING — GENERAL DEPOSIT — DEMAND. — When a deposit in bank is general, with nothing fixing any time or terms for its repayment, the statute of limitations does not commence to run in favor of the bank until after demand and refusal to pay, provided they occur within a reasonable time, and before the right to demand the deposit has become stale. *Munnerlyn v. Augusta Sav. Bank*, 159.

See JUDGMENTS, 5, 7; NEGOTIABLE INSTRUMENTS, 4; PLEADING, 7.
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LIVE-STOCK.

See RAILROADS, 26-30, 33; REAL PROPERTY, 1, 2.

MAGISTRATES.

See MALICIOUS PROSECUTION, 2, 15, 16.

MAINTENANCE.

See NEGOTIABLE INSTRUMENTS, 8.

MALICE.

See LIBEL, 1, 2, 4, 5; MALICIOUS PROSECUTION, 3-5, 8, 14-17.

MALICIOUS PROSECUTION.

1. The fact that the complaint against defendant charged no legal offense does not constitute any defense to an action for malicious prosecution, if such complaint was an effort to charge a felony, and the accused was arrested and tried in the same manner he would have been if a strictly legal proceeding had been instituted. *Finn v. Frink*, 348.
2. THE MAKING OF A CORRECT STATEMENT TO THE MAGISTRATE who issued the warrant of arrest will not relieve the prosecutor from liability, if, after making such statement, he verified a complaint charging a criminal offense. *Lunsford v. Dietrich*, 79.
3. MALICE does not necessarily consist of a desire to injure the accused. Any other motive than a *bona fide* purpose to bring him to punishment as a violator of the criminal law, or associated with such purpose, is malicious. Whatever is done willfully and purposely, whether the motive be to injure the accused, to gain some advantage to the prosecutor, or through wantonness or recklessness, if it be at the same time wrong and unlawful, within the knowledge of the actor, is, in legal contemplation, maliciously done. *Lunsford v. Dietrich*, 79.
4. MALICE MAY BE INFERRED FROM ABSENCE OF PROBABLE CAUSE. *Lunsford v. Dietrich*, 79.
5. THE BURDEN OF PROOF RESTS UPON PLAINTIFF in an action for malicious prosecution, to show that the prosecution of which he complained was both malicious and without probable cause. *Lunsford v. Dietrich*, 79.
6. THE BURDEN OF PROOF OF PROBABLE CAUSE must be assumed by the defendant, if the plaintiff was tried and acquitted of the offense charged. *Lunsford v. Dietrich*, 79.
7. EVIDENCE. — In an action for malicious prosecution for blackmail in sending a letter to the defendant, threatening him, as a physician, with an action for malpractice while treating the plaintiff, the defendant is not entitled, as evidence of probable cause, to introduce testimony tending to prove that his treatment of the plaintiff was professionally correct and skillful. *Finn v. Frink*, 348.
8. EVIDENCE OF THE ANXIETY OF THE PROSECUTOR to have the plaintiff arrested, and his efforts to procure or aid such arrest, is material, as tending to establish malice. *Lunsford v. Dietrich*, 79.
9. PROBABLE CAUSE is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the person accused is guilty of the offense charged. *Lunsford v. Dietrich*, 79.
10. PROBABLE CAUSE cannot be established merely by proving that the

prosecution was undertaken from public motives. *Lunsford v. Dietrich*, 79.

11. PROBABLE CAUSE. — BELIEF IN THE GUILT OF AN ACCUSED is an essential element of probable cause, and if such belief is not generated in the mind of the prosecutor, it is not material that the known facts and circumstances were such as might have generated it in the mind of a prudent and cautious man. *Lunsford v. Dietrich*, 79.
12. PROBABLE CAUSE. — MERE SUSPICION OR BELIEF, however honestly or intensely entertained, unless supported by facts known to the prosecutor which would justify a reasonable and cautious man in believing the accused to be guilty, cannot constitute probable cause. *Lunsford v. Dietrich*, 79.
13. PROBABLE CAUSE. — COUNSEL AND ADVICE OF A TRIAL JUDGE in favor of the institution of a criminal prosecution, given upon a full and fair statement of the facts by the complainant, cannot exonerate him from responsibility as would the advice of a counselor of law under the same circumstances. *Finn v. Frink*, 348.
14. INFERENCE OF MALICE cannot be drawn, in an action for malicious prosecution, from mere want of probable cause, when other circumstances disclose an entire absence of malice. *Madison v. Pennsylvania R. R. Co.*, 756.
15. INFERENCE OF MALICE FROM WANT OF PROBABLE CAUSE — BURDEN OF PROOF. — Evidence by a plaintiff in malicious prosecution of his arrest, and of his subsequent discharge by a magistrate, raises a presumption of want of probable cause, from which an inference of malice may be drawn. The burden is then on the defendant to disprove malice, unless its absence is disclosed by the further evidence offered by the plaintiff. *Madison v. Pennsylvania R. R. Co.*, 756.
16. WANT OF MALICE. — Defendant in an action for malicious prosecution is not liable when the inference of malice drawn from the presumption of want of probable cause, arising from the discharge of the plaintiff by a magistrate, is disproved by plaintiff's evidence showing an entire absence of malice. *Madison v. Pennsylvania R. R. Co.*, 756.
17. WANT OF MALICE. — Plaintiff in malicious prosecution is not entitled to recover when his own evidence shows that his arrest was caused by the police alone, and for the purpose of discovering the perpetrators of a series of crimes against the defendant, thus showing an entire want of malice on the part of the latter. *Madison v. Pennsylvania R. R. Co.*, 756.

MALPRACTICE

See MALICIOUS PROSECUTION, 7.

MANDAMUS.

STATE OFFICER PERSONALLY LIABLE FOR COSTS IN. — Where judgment goes against a state officer in a proceeding against him by *mandamus*, he is personally liable for costs, like any other litigant; but if such costs were properly incurred, he has a claim against the state for reimbursement. *State v. Stone*, 561.

MANDATORY.

See STATUTES, 2.

MANDATUM.

See BANKS, 10.

MANUFACTURING COMPANIES.

See WATERCOURSES, 5.

MARKETS.

See CORPORATIONS, 5, 6.

MARRIAGE.

See DEVISE, 2, 3; SEDUCTION, 1.

MARRIAGE AND DIVORCE.

ANTENUPTIAL CONTRACT PROCURED BY FRAUD SET ASIDE WHEN. — When an intended husband, by misrepresentation, deception, and undue advantage, fraudulently induces his intended wife to execute an antenuptial contract, she may, after the marriage, and before his death, have such contract set aside; and she has the right to prove his misconduct after marriage, for the purpose of showing that her act in bringing the suit was not premature. *Lamb v. Lamb*, 227.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. **PARENT AND CHILD.** — **CONTRACT SIGNED BY A MINOR AND HER FATHER,** respecting wages to be earned by her, is, in law, the contract of the father, and therefore cannot be avoided or disaffirmed by her. Hence, if such contract stipulates that the wages shall be paid to her, but that if she leaves the employment without first giving two weeks' notice, or fails to work faithfully during the period of two weeks after giving notice of the intention to leave, then that a sum specified shall be forfeited to her employer as liquidated damages, and may be deducted from wages due, such stipulation is valid and enforceable. *Tennessee Mfg. Co. v. James*, 865.
2. **DAMAGES.** — **THE RIGHT OF AN EMPLOYER TO DEDUCT A SUM SPECIFIED AS LIQUIDATED DAMAGES** from the wages of an employee, who leaves the service without first giving previous notice of his intention to do so, as stipulated in a contract of employment, cannot be defeated by the employee returning on the next day after quitting work, and offering to work out her notice. *Tennessee Mfg. Co. v. James*, 865.
3. **DAMAGES, CONTRACT FOR LIQUIDATED, WHEN SUSTAINABLE.** — A sudden breaking off of a contract for services by either party involves such difficulties concerning the actual loss as renders a reasonable agreement for stipulated damages appropriate and valid. Therefore, if a contract for services stipulates that if the employee shall leave the service without giving two weeks' previous notice of his intention so to do, he shall forfeit a specified sum, which may be deducted from wages due him, such stipulation is valid, especially if the circumstances and nature of the employment are such that it will be difficult to calculate with any certainty the actual loss resulting from abandoning the employment without previous notice. *Tennessee Mfg. Co. v. James*, 865.
4. **MONTHLY HIRING.** — If one is employed to be paid by the month a designated price, this constitutes an entire contract by the month, which the employer cannot terminate at will, and under which he is liable for a

month's wages if he discharges his employee without cause before the expiration of the month. *Moss v. Decatur Land etc. Co.*, 55.

6. **MASTER NOT LIABLE FOR ACT OF SERVANT NOT ENGAGED ABOUT MASTER'S BUSINESS.** — A master is not liable for the wrongful act of his servant, unless such act was done by the servant while he was engaged about his master's business. Where, therefore, a baggage-master on a railway train, at the solicitation of the express-messenger, leaves his own compartment and goes into that of the express-messenger, and while there so terrifies a boy who is riding in that part of the car that he jumps from the car while it is running at a high rate of speed, and is killed, the railway company is not liable for the wrongful act of the baggage-master, unless it was done while he was about the company's business and in the performance of some duty with respect to the boy. *Louisville etc. R'y Co. v. Douglass*, 582.

6. **MASTER'S LIABILITY FOR SERVANT'S COMMUNICATING A CONTAGIOUS DISEASE.** — A railway corporation is not liable to one contracting small-pox from its ticket agent when visiting its office for the purpose of purchasing a ticket, if the corporation had no knowledge that its agent was afflicted. The negligent or accidental act of the agent in imparting the contagious disease to the purchaser of the ticket was not within the scope of his employment, so as to charge his principal. *Long v. Chicago etc. R. R. Co.*, 271.

7. **RISKS OF EMPLOYMENT.** — When a servant, suspecting a danger not necessarily incident to his employment, complains thereof to his master, who assures him that he is in no danger, he has a right to rely upon that assurance; and if he is subsequently injured by the danger complained of, he cannot be deemed to be guilty of contributory negligence. *Wagner v. Jayne Chemical Co.*, 745.

8. **RISK OF EMPLOYMENT — NEGLIGENCE, WHEN QUESTION OF FACT.** — When, in an action to recover for injuries sustained by inhaling fumes of nitric acid, the proof shows that plaintiff was employed as an outside common laborer, but was ordered by his employer to do inside work in connection with a manufacturing process in which nitric acid was used, evolving poisonous fumes, of which defendant had knowledge and had warned other workmen, but the evidence is conflicting as to whether or not plaintiff's injury could have been caused by such fumes, and as to whether or not he knew or had been warned that they were dangerous, the question of negligence, both on the part of plaintiff and defendant, should be submitted to the jury for determination. *Wagner v. Jayne Chemical Co.*, 745.

9. **EMPLOYER WILL BE PRESUMED TO BE FAMILIAR WITH DANGERS,** latent as well as patent, ordinarily accompanying the business in which he is engaged. *Wagner v. Jayne Chemical Co.*, 745.

10. **DUTY OF MASTER TO PROVIDE FOR AND WARN SERVANT.** — An employer is bound to exercise reasonable precaution against injury to his employees, while in his service and obeying his orders. He must provide suitable instruments and means with which to carry on the business which he sets them to do, and must warn them of all dangers to which they will be exposed in the course of their employment, except those which the employee may be deemed to have foreseen as necessarily incidental to his employment, or which may be open and obvious to a person of his experience and understanding, or such as the employee cannot be deemed to have foreseen. *Wagner v. Jayne Chemical Co.*, 745.

- 11. RISKS OF EMPLOYMENT — FUMES OF NITRIC ACID.** — There is nothing in the employment of a common laborer that presupposes any scientific knowledge of the property of acids, or that poisonous fumes are likely to be evolved in a manufacturing process in which nitric acid is used, although such fumes are perceptible to the senses. Hence it is not presumed that such laborer either possesses or professes such knowledge, and without some such previous knowledge, the danger from exposure to such fumes is not open and obvious, and such laborer cannot be deemed to have assumed such risk, unknown to him, though naturally and reasonably incident to his employment. *Wagner v. Jayne Chemical Co.*, 745.
- 12. RISKS ASSUMED BY SERVANT.** — An employee will be deemed to have assumed all risks naturally and reasonably incident to his employment, and to have notice of all risks which, to a person of his experience and understanding, are, or ought to be, open and obvious. *Wagner v. Jayne Chemical Co.*, 745.
- See BAILMENTS, 4, 6; EVIDENCE, 6, 7; FRAUD, 4; LIBEL, 7; NEGLIGENCE, 1, 10; RAILROADS, 6, 8, 14, 20-25, 31, 38; TELEGRAPHS, 5.

MECHANICS' LIENS.

- 1. MECHANICS' LIENS CANNOT, AS A GENERAL RULE, BE ENFORCED AGAINST PROPERTY NOT SUBJECT TO SALE UNDER EXECUTION;** but if property belongs to a corporation having power by its voluntary act to create a lien thereon, whereby it may be subjected to seizure and sale, it may also be subject to a mechanic's lien. *Badger Lumber Co. v. Marion Water Supply etc. Co.*, 306.
- 2. THE FACT THAT PROPERTY IS UPON OR WITHIN A PUBLIC STREET** does not prevent a mechanic's lien from attaching in favor of a contractor who furnished it, if it is rightfully there under a franchise granted by the municipal authorities. *Badger Lumber Co. v. Marion Water Supply etc. Co.*, 301.
- 3. FOR WHAT APPURTENANCES MAY BE ENFORCED.** — Poles planted in the public streets by an electric-light corporation, and connected with its electric-light plant, machinery, and power-house situate upon its real estate, are appurtenant to such plant and realty, and entitle the person who supplied them to a lien thereon, under a statute granting a lien to any person furnishing materials for erecting, altering, or repairing any building, or an appurtenance of any building, upon the whole piece or tract of land, the building, and appurtenances. *Badger Lumber etc. Co. v. Marion Water Supply etc. Co.*, 301.
- 4. MECHANICS' LIENS AGAINST PROPERTY OF QUASI PUBLIC CORPORATIONS.** — The property of an electric-light corporation, having a franchise from a city to occupy its streets in the transmission of light to its inhabitants, is subject to a mechanic's lien under a statute granting such lien to any mechanic or other person who shall, under contract with the owner of any tract of land, perform labor or furnish material for erecting, altering, or repairing any building or appurtenance to any building, or any erection or improvement. *Badger Lumber Co. v. Marion Water Supply etc. Co.*, 306.

MENTAL ANGUISH.

See DAMAGES, 6; NEGLIGENCE, 4; TELEGRAPHS, 8, 9.

MERGER.

1. **DOCTRINE OF, NOT APPLICABLE AGAINST PERSON PAYING DEBT FOR WHICH HE IS NOT LIABLE.** — The technical doctrine of merger cannot be applied against a person not liable for a debt, who pays it off to protect property acquired from the person primarily liable. *Boos v. Morgan*, 237.
2. **NOT PREVENTED, WHERE FRAUD OR WRONG WOULD RESULT.** — Merger is never prevented when fraud or wrong would result if it were defeated. If a legal rule secures justice, equity does nothing to defeat its operation, but gives it complete and effective force. *Boos v. Morgan*, 237.

See JUDGMENTS, 2.

MISNOMER.

See PROCESS, 2.

MISTAKE

1. **REFORMATION OF CONTRACT, DEGREE OF PROOF NECESSARY IN ACTION FOR.** — In an action to reform a written contract on the ground that, owing to a mistake, it fails to express the agreement which the parties to it actually made, it is incumbent upon the party alleging the mistake to clearly establish it by satisfactory proofs, but he is not bound to establish the mistake beyond a reasonable doubt. It is not, therefore, error, in an action upon a contract, in which the answer sets up a mistake, and asks for a reformation thereof, for the court to refuse to charge the jury "that the burden of proof is on the defendant to satisfy the jury, beyond a reasonable doubt, that there was a mutual mistake in this case." *Southard v. Curley*, 642.
2. **MISTAKE OF LAW — EQUITABLE RELIEF.** — When parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect. *Renard v. Clink*, 458.
3. **MISTAKE OF LAW — EQUITABLE RELIEF.** — When a person is ignorant or mistaken with respect to his own antecedent and existing legal rights, interests, or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. *Renard v. Clink*, 458.
4. **DEEDS — REFORMATION OF, FOR MISTAKE — EVIDENCE INSUFFICIENT TO JUSTIFY.** — When a wife's name is mentioned in the recitals of a deed as a party thereto, but she is neither named nor referred to in the granting or operative clauses of the deed, where the name of her husband alone appears, and the proof shows that the party drawing the deed was instructed to make it to the husband and wife jointly, but a mortgage of the same date recites that the husband is the sole owner of the land, the evidence is not sufficiently clear and certain to reform the deed on the ground that the name of the wife was omitted therefrom by mistake, and that it was intended to convey the land to the husband and wife jointly. *Boyetown Nat. Bank v. Hartman*, 759.

- 5. DEEDS — REFORMATION OF, FOR MISTAKE. — EVIDENCE SUFFICIENT TO REFORM A DEED** on the ground of mistake must be clear, precise, and indubitable, and of such weight and directness as to establish the facts alleged beyond a reasonable doubt. *Bovertown Nat. Bank v. Hartman*, 759.

See ELECTIONS, 6.

MONUMENTS.

See PLEADING, 1.

MORTGAGES.

- 1. SUBROGATION, DOCTRINE OF, APPLICABLE, THOUGH RIGHTS OF THIRD PERSONS INTERVENE, WHEN. —** Where a mortgagee, induced by the fraudulent representations of the mortgagor that his mortgage would thereby become the senior lien, pays money to remove prior liens on the property, he is entitled to be subrogated to the rights of the holders of such prior liens, as against a person whose lien is prior to the lien of the mortgage, but junior to the liens satisfied. *Backer v. Pyne*, 231.
- 2. ASSIGNMENT OF — RIGHTS OF ASSIGNEE. —** The assignee of a mortgage and accompanying negotiable note, transferred before maturity and for a valuable consideration, takes the securities free of any equities existing between the original parties of which he had no notice. *Williams v. Keyes*, 438.
- 3. PAYMENT OF ASSIGNED MORTGAGE. —** When a mortgagee assigns the mortgage and a negotiable note secured thereby, before maturity, and for a valuable consideration, and the mortgagor, without knowledge of such assignment, pays the mortgage debt to the administrator of the original mortgagee without requiring the production of the note and mortgage, such payment is no defense to foreclosure of the mortgage by the assignee. *Williams v. Keyes*, 438.
- 4. PAYMENT OF ASSIGNED MORTGAGE — CONSTRUCTION OF STATUTE. —** A statute reciting that "the recording of an assignment of a mortgage shall not, of itself, be deemed notice of such assignment to the mortgagor, so as to invalidate any payment made by him to the mortgagee," does not authorize the mortgagor to pay the mortgage to one not the holder of the negotiable note secured thereby, but it only means that the mortgagor shall not be required to search the record before making payment to the one *prima facie* entitled to receive it, who, in case the mortgage is accompanied by a negotiable note, is the holder thereof. *Williams v. Keyes*, 438.
- 5. MORTGAGE TO DEFRAUD CREDITORS — RIGHT OF MORTGAGOR TO DISPUTE VALIDITY OF. —** In an action by a mortgagee to enforce a mortgage, the mortgagor may successfully dispute its validity by showing that it was given without any consideration, and for the purpose of defrauding his creditors. *Williams v. Clink*, 443.
- 6. MORTGAGE. — A TENDER OF THE FULL AMOUNT** due upon a mortgage discharges the mortgage lien, if the tender is refused without adequate excuse. *Renard v. Clink*, 458.
- 7. MORTGAGES — TENDER AS DISCHARGE OF. —** When an attempted foreclosure of a mortgage at law has proved ineffectual because an assignment of the mortgage was not of record at the time of such attempted foreclosure, a subsequent tender of the amount due upon the mortgage, exclusive of the costs of such foreclosure proceeding, is not sufficient to

discharge the lien of the mortgage, and the mortgagee, after offering to apply the money tendered upon the mortgage debt, and having this offer refused, may maintain a bill in equity to foreclose the mortgage. *Renard v. Clink*, 458.

8. **EXECUTORS AND ADMINISTRATORS — APPOINTMENT OF MORTGAGOR AS EXECUTOR IS NOT PAYMENT OF MORTGAGE.** — When a mortgagor is appointed executor of the will of his mortgagee, and inventories the recorded mortgage as part of the assets of the estate, without mentioning the mortgage note, which is produced in court and treated as assets during the administration, his appointment as executor will not operate to discharge the mortgage and note, but they become assets of the estate, and may be legally assigned to a legatee under an order of final distribution. Such legatee may then maintain a bill to foreclose the mortgage, although, prior to its assignment or distribution, and to the final discharge of the executor, he had represented the mortgaged land to be unencumbered, and had sold it to a third person, received the purchase-money, and executed a warranty deed. In such case the purchase-money received by the executor will be applied to the payment of the mortgage debt, and the balance due on such debt will be declared a lien on the land in favor of such legatee; and as the purchaser from the executor has a complete remedy at law upon his warranty of title, the fact that he has absconded, leaving no property, affords no ground for equitable relief against such legatee. *Crow v. Conant*, 427.

9. **EXECUTORS AND ADMINISTRATORS — APPOINTMENT OF MORTGAGOR AS EXECUTOR DOES NOT AFFECT EQUITY OF REDEMPTION.** — When a mortgagor is appointed executor of the will of his mortgagee, and accepts the trust, the mortgage debt is not thereby discharged as a lien against the land, and it thereby becomes an asset of the estate, but the equity of redemption does not thereby become such an asset, and if the mortgage debt is assigned to a legatee on final distribution, the latter does not acquire any interest in money thereafter received by the executor upon his sale of such equity of redemption. *Crow v. Conant*, 427.

10. **EXECUTORS AND ADMINISTRATORS — APPOINTMENT OF DEBTOR AS PAYMENT.** — The equitable rule that if a debtor is appointed executor of the will of his creditor, and accepts the trust, the debt is presumed to have been paid, and is treated as assets in the hands of the executor for the payment of debts and legacies, does not operate to discharge a lien by which such debt is secured. *Crow v. Conant*, 427.

11. **CONFLICT OF LAWS — PLACE OF PERFORMANCE.** — When a bond and mortgage for the purchase of real estate in one state are executed in another state, but show upon their face that they are to be performed in the state where the land is situated, their validity, nature, obligation, and interpretation must be governed by the laws of the latter state, although brought in question in some other state. *Baum v. Birchall*, 797.

See **CHATTEL MORTGAGES**, 5; **EQUITY**, 5; **EVIDENCE**, 12; **HUSBAND AND WIFE**, 2; **INSURANCE**, 1, 5; **MISTAKE**, 4; **SURETYSHIP**, 7; **USURY**.

MULTIFARIOUSNESS.

See **PLEADING**, 10.

MUNICIPAL CORPORATIONS.

1. **SPECIFIC ENUMERATION OF CORPORATE POWERS IN STATUTE, EFFECT OF.** — When, in a general statute for the incorporation of cities, there is a specific

- enumeration of certain powers which would belong to the corporation, without specific enumeration, the specific statute is to be regarded, not as the source of the power, but as a mere declaration of a pre-existing power, or of a power inherent in the very nature of a municipal corporation, and essential to enable it to accomplish the end for which it is created. And the enumeration of powers, including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated. *Crawfordsville v. Braden*, 214.
2. **MUNICIPAL CORPORATION HAS NO AUTHORITY TO DECIDE LEGAL CONTROVERSIES.** — The act for the incorporation of cities does not vest in the common council of cities the power to determine legal controversies concerning personal or property rights, but the decision of such controversies must be made by judicial tribunals, and to them an injured party has a right to appeal for a vindication of his rights. *Williams v. Citizens' R'y Co.*, 201.
 3. **DISCRETION OF MUNICIPAL CORPORATIONS NOT SUBJECT TO JUDICIAL CONTROL.** — The discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen. *Crawfordsville v. Braden*, 214.
 4. **LIGHT TO PRIVATE CONSUMERS, MUNICIPALITY MAY FURNISH.** — A municipal corporation may establish and maintain works for lighting its streets, and may at the same time furnish the light to the inhabitants, to light their residences and places of business. *Crawfordsville v. Braden*, 214.
 5. **POWER TO LIGHT CITY IMPLIES POWER TO SELECT MEANS OF DOING SO.** — The power to light the streets and public places of a city carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. *Crawfordsville v. Braden*, 214.
 6. **POWER TO LIGHT STREETS OF CITY, IMPLIED AND INHERENT MUNICIPAL POWER.** — The power to light the streets and public places of a city is one of the implied and inherent powers of the municipality, necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. *Crawfordsville v. Braden*, 214.
 7. **DOGS RUNNING AT LARGE, CITY ORDINANCE MAY AUTHORIZE KILLING OF, WITHOUT NOTICE.** — A municipal corporation may, in the exercise of the police power, provide by ordinance that unmuzzled dogs running at large shall be killed. Such ordinance does not violate the constitutional rights of the owners, although their property is destroyed without notice to them. *Julienne v. Mayor*, 526.
 8. **"RUNNING AT LARGE," MEANING OF.** — A dog found in a street of a city, unmuzzled, and unaccompanied by its owner, is deemed to be "running at large," within the meaning of a city ordinance authorizing the killing of dogs so found, and may be lawfully killed by a police-officer, although it has just escaped from confinement, and the owner is in pursuit of it. *Julienne v. Mayor*, 526.
 9. **POWER OF MUNICIPAL CORPORATION TO PRESERVE HEALTH AND SAFETY OF ITS INHABITANTS.** — The legislature, by the act authorizing the organization of a municipal corporation, expressly delegates to the municipality the power to preserve the health, safety, and property of its inhabitants. *Crawfordsville v. Braden*, 214.

10. **CORPORATE FUNCTIONS, EXERCISE OF, CAN BE QUESTIONED BY STATE ONLY WHEN.** — Where there is an assumption of corporate rights and functions, and an exercise of such rights and functions under claim and color of law, only the state can question the validity of the assumption and exercise of such functions and rights, and an individual cannot successfully assail them in a collateral proceeding. *Williams v. Citizens' R'y Co.*, 201.
11. **RESOLUTION OR ORDINANCE, CITY MAY EMPLOY EITHER, WHEN.** — Where a city council has power to act in a given case, and its charter does not prescribe the manner of action, it may accomplish its object by resolution as well as by ordinance. *Crawfordsville v. Braden*, 214.
12. **RIGHT TO USE STREET CANNOT BE DESTROYED OR IMPAIRED WHEN.** — Where a right to use a street is acquired pursuant to a statute and under a license from the municipality, it is in the nature of a contract right, and the municipality itself cannot destroy nor materially impair it; and the courts must decide all controversies in which such rights are involved. *Williams v. Citizens' R'y Co.*, 201.
13. **ASSESSMENT ON ABUTTING PROPERTY FOR SWEEPING STREET IS NOT TAX.** — An assessment made against the owners of property abutting on streets required to be swept and sprinkled, for the purpose of paying the expense of such sweeping and sprinkling, is not a tax, but a local assessment, and a statute authorizing such an assessment does not violate a constitutional provision requiring an equal and uniform rate of taxation. *Reinken v. Fuehring*, 247.
14. **POLICE POWER, LOCAL ASSESSMENTS FOR SWEEPING STREETS PROPER EXERCISE OF.** — Since the public in general has an interest in keeping the streets free from filth, a city may, in exercising the police power conferred upon it by the state, order them swept; and as the abutting property owner derives a benefit from such sweeping not enjoyed by the general public, he may be required by assessment to pay the expense of such sweeping; and such an assessment does not amount to a taking of private property without compensation and without due process of law. *Reinken v. Fuehring*, 247.
15. **ESTOPPEL.** — The doctrine of estoppel has been extended to municipal corporations as to matters within the scope of their powers and the powers of their officers, so as to bind them by their own acts and acquiescence, and the acts and acquiescence of their officers, whenever an estoppel would exist in the case of a natural person. *Hutchinson etc. R. R. Co. v. Commissioners*, 273.
16. **A MUNICIPAL CORPORATION LEAVING UNGUARDED, in the night-time, and without danger-signals, an excavation extending upon or near to a cross-walk in a public street is guilty of gross carelessness.** *Olathe v. Mizee*, 308.
17. **NEGLIGENCE — CONCURRENT AND CONTRIBUTORY.** — If a woman, walking in the night-time on a cross-walk in a public street is caused to step to one side to avoid collision with persons approaching from the opposite direction, and is injured by falling into an unguarded excavation by the side of the walk, the municipality, through whose negligence the excavation was thus left unguarded, cannot avoid liability on the ground that the injury partly resulted from the negligence of the persons thus approaching, nor on the ground that the plaintiff was guilty of contributory negligence in stepping aside from the walk. The divergence from the cross-walk is not ordinarily evidence of want of care. *Olathe v. Mizee*, 308.

18. **DEGREE OF CARE OVER STREETS IMPOSED UPON.** — Ordinary care over the streets is the measure of diligence imposed upon a municipal corporation. It is not an insurer against injury to persons using its streets. *Nesbitt v. Greenville*, 521.
19. **DEFECTS IN STREET OBSTRUCTION — MUNICIPALITY BOUND TO TAKE NOTICE OF SUCH AS ORDINARY CARE WILL DISCOVER.** — Where an obstruction in a street is created by a city itself, or is permitted to be erected by another, the city must take notice of such defects in the obstruction as ordinary care will discover. *Nesbitt v. Greenville*, 521.
20. **STREET, STRUCTURE IN, MUST BE MADE AND KEPT REASONABLY SAFE.** — A structure in a public street must be erected in such a manner and with such materials as to be reasonably safe, and must be kept in a safe condition. It is as much the duty of the city to make proper repairs from time to time as to make the structure safe originally. *Nesbitt v. Greenville*, 521.
21. **MUNICIPALITY CHARGEABLE WITH COMMON KNOWLEDGE, SAME AS NATURAL PERSON.** — A municipal corporation is liable for injury resulting from its defective structures, when, by reasonable diligence, it might have acquired knowledge of the defect. The common knowledge of mankind as to the action of the elements, and the like, is to be attributed to municipalities, just as to natural persons. *Nesbitt v. Greenville*, 521.
22. **DAMAGES FOR CHANGE IN GRADE OF STREET.** — A property owner who has built a house upon his lot in conformity with the existing physical grade of an old and open highway can recover damages from a city for depreciation in the value of the property, caused by changing the existing physical elevation of the highway in front of the lot to conform to a plan or regulation legally confirmed after the building of the house, such plan being the first regulation of grade, and differing from the existing physical elevation of the old highway in front of the lot. *O'Brien v. Philadelphia*, 832.
23. **LIABILITY OF.** — When a public officer, in the line of his duties, does a public work within a town, for the public benefit or use, the town, in the absence of any direction to him, is not liable for his misconduct in such work, though it appointed him, and is obliged to pay the costs of the work, and therefore a town is not answerable to one whose property was taken and used in the construction of a highway by a highway surveyor, charged with the duty of opening and keeping in repair all public highways, and who is appointed and paid by the town. *Goddard v. Harpswell*, 373.
24. **UNCONSTITUTIONAL STATUTE — LIABILITY FOR ACTS UNDER.** — A city acting under authority of a statute afterwards declared unconstitutional is responsible for all damages sustained by its acts, but an officer or agent of a city who acts by its direction in the premises is not personally responsible, and the same rule applies to a citizen who acts as the mere representative of such officer in the performance of a duty which apparently and by color of law rests upon him as a citizen, and which would necessarily be performed by the officer without any personal liability if the citizen refused to obey the mandate of the officer. *Dunn v. Mellon*, 706.
25. **UNCONSTITUTIONAL STATUTE — LIABILITY FOR ACTS UNDER.** — A citizen subject to the duty of obeying, and who does obey and execute, the mandatory order of a city passed by it by virtue of a statute afterwards declared unconstitutional, is not personally liable in damages for the re-

suit of his act. In such case, however, the city is liable. *Dunn v. Mellon*, 706.

26. MUNICIPAL BONDS — VOID CHARTER. — A corporation having no legal existence has no legal power to issue bonds or obligations of a binding character, though it is acting as a municipal corporation and in the apparent exercise of legal corporate power. This rule does not apply to municipal corporations whose organization is irregular merely; but if the constitution or a statute declares that certain acts done or omissions occurring in an effort to organize such corporation shall render void the attempt to organize it, the court will not disregard such prohibition at the instance of a creditor deceived by the appearance of a legal organization. *Ruchs v. Athens*, 858.

27. RAILROAD-AID BONDS, ESTOPPEL TO CONTEST VALIDITY OF. — A township is estopped from claiming that a petition for a special election was not signed by the requisite number of tax-payers, if the fact that it was so signed is entered on the journals of the board of county commissioners in ordering the election, and an election is thereafter had at which the proposition to issue bonds is carried, and they are afterwards issued in due form, containing all the recitals required by law, in consideration of which the railroad is located, constructed, equipped, and operated, without objection or protest from any of the citizens of the township. *Hutchinson etc. R. R. Co. v. Commissioners*, 273.

28. RAILROAD-AID BONDS. — A FINDING ON THE PART OF COUNTY COMMISSIONERS that the preliminary steps required by law, such as a petition signed by two fifths of the tax-payers, or election, and a majority vote, have been taken is conclusive in favor of a railroad corporation which accepts bonds or a subscription based upon such finding. *Hutchinson etc. R. R. Co. v. Commissioners*, 273.

29. MUNICIPAL BONDS — ISSUANCE — VALIDITY. — When the power to issue water-works bonds is vested in a village council, such bonds are not binding upon the village until its council has met at a legal meeting and voted to issue the bonds, or authorized their issue. *Portsmouth Sav. Bank v. Village of Ashley*, 511.

30. MUNICIPAL BONDS — ISSUANCE — VALIDITY. — When the power to issue water-works bonds is vested in a city council, a resolution of such council authorizing its president and clerk to sign such bonds confers no authority upon such officers to issue and dispose of the bonds after signing them. *Portsmouth Sav. Bank v. Village of Ashley*, 511.

31. MUNICIPAL BONDS — DEFENSES AGAINST. — Purchaser of municipal water-works bonds is bound to take notice of the law under which they are issued, and of the records of the city issuing them, and when such records disclose that they were not issued in compliance with law, the purchaser takes them at his peril, and they are not binding against the city. *Portsmouth Sav. Bank v. Village of Ashley*, 511.

See **ESTOPPEL**, 2-5; **HIGHWAYS**, 2-5; **INJUNCTIONS**, 1; **LEGISLATURE**, 1; **MECHANICS' LIENS**, 2; **NEGLIGENCE**, 12, 13, 19, 20; **TRUSTS**, 1-3; **WATER COMPANIES**, 3.

MUTUAL BENEFIT SOCIETIES.

See **ASSOCIATIONS**.

NAVIGATION.

See **REAL PROPERTY**, 3; **WATERCOURSES**, 1.

NEGLIGENCE.

1. **FIRES — HABITS OF EMPLOYEES.** — In an action against a mill-owner to recover for damages caused by fire spread from the accidental burning of his saw-mill, evidence that the fireman and engineer of the mill were in the habit of using intoxicating liquor, and were occasionally under its influence, is inadmissible to show negligence, in the absence of proof that such liquor habit or occasional intoxication had any bearing upon the origin of the fire, or anything to do toward preventing its extinction. *McNally v. Cohell*, 494.
2. **FIRES — LIABILITY FOR.** — The owner of a saw-mill, surrounded by inflammable material, and in which a fire is liable to break out at any time, is bound to exercise only such care to prevent the destruction of surrounding property by accidental fire starting in such mill as a man of ordinary prudence and caution, under all the circumstances, would exercise in reference to property of the same kind similarly situated, and belonging to himself. But to operate such mill without any appliances or means at all to extinguish fires is negligence, as matter of law. *McNally v. Cohell*, 494.
3. **FIRES — LIABILITY OF MILL-OWNER IN RESPECT TO.** — In an action to recover for damages to adjacent property, caused by accidental fire originating in a saw-mill, evidence of the practice and appliances used at other similar mills at different places, necessarily under different conditions and surroundings, is inadmissible to show negligence in the case under consideration. *McNally v. Cohell*, 494.
4. **DAMAGES — MERE FRIGHT OR MENTAL AGONY** caused by a railway accident, unaccompanied by some physical injury to the person, is too remote to sustain an action for negligence, although it produces permanent injury to the nervous system. *Ewing v. Pittsburgh etc. R'y Co.*, 709.
5. **NEGLIGENCE, OF WHAT A PROXIMATE CAUSE.** — The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted, notwithstanding the latter. *Railroad v. Kelly*, 902.
6. **PRESUMPTION OF.** — IF A PASSENGER RECEIVES INJURIES FROM THE DERAILMENT of a railway car, the presumption is that such derailment resulted from the negligence of the carrier. This presumption can be rebutted only by satisfying the jury that the derailment was not due to any negligence, and could not have been prevented by the exercise of the highest degree of care, skill, and diligence on the part of the carrier. *Alabama etc. R. R. Co. v. Hill*, 65.
7. **NEGLIGENCE, WHEN NOT PRESUMED FROM ACCIDENT.** — When the loss of property in the hands of a common carrier is caused by an unprecedented flood, amounting to an act of God, and is not due to the failure of any of the appliances of transportation, no presumption of negligence arises from the accident which will cast the burden of proof upon the carrier to show an absence of negligence on his part. *Long v. Pennsylvania R. R. Co.*, 732.
8. **EVIDENCE — BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE** of the plaintiff rests upon the defendant. *Alabama etc. R. R. Co. v. Frasier*, 28.
9. **CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY WHEN.** — When contributory negligence is relied on as a defense, unless evidence thereof is so plain and convincing as to leave no doubt in the minds of reasonable

men, it is error for the court to peremptorily instruct for the defendant. *Nesbitt v. Greenville*, 521.

20. **WILLFUL INJURIES. — A PLEA OF THE CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF IS INSUFFICIENT** when the complaint alleges that injuries were willfully inflicted upon plaintiff by one of defendant's employees while acting within the scope of his employment. *Alabama etc. R. R. Co. v. Frazier*, 28.
21. **PEREMPTORY INSTRUCTION FOR DEFENDANT IMPROPER WHEN. —** In an action to recover damages for alleged negligence, where the defendant's freedom from culpability is not so manifestly clear as to leave no room for differences of opinion among reasonable men, the question of negligence ought to be left to the jury, and it is error to instruct peremptorily for the defendant. *Nesbitt v. Greenville*, 521.
22. **MUNICIPAL CORPORATIONS — STREETS, NEGLIGENCE IN USE OF. —** A person desiring to cross a street is not confined to the crossing, but may assume that all parts of the street which are intended for travel are reasonably safe. He may therefore cross at any point without being liable to the imputation of negligence, if he has no notice of any dangerous excavation or obstruction. *Olathe v. Mize*, 308.
23. **PROXIMATE AND REMOTE CAUSE APPLIES TO MUNICIPALITIES. —** The rule that a person is responsible for such consequences of his fault as are natural and probable, and might be foreseen by ordinary forecast, but not for such as are the result of an extraordinary event, not likely to be foreseen, applies in actions against municipal and *quasi* municipal corporations, as well as to natural persons and private corporations. *Schaeffer v. Jackson Township*, 792.
24. **CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY. —** When a person passing along a sidewalk in a city observes a trunk suddenly pitched toward him from defendant's delivery wagon, and in seeking to avoid being struck by the flying trunk, moves toward the center of the sidewalk, keeping his eye on the trunk, and in so doing falls over another trunk, placed upon the sidewalk by defendant, thus sustaining injuries for which he seeks to recover, the question of his contributory negligence in the matter is for the jury to determine. *Vallo v. United States Express Co.*, 741.
25. **SUDDEN PERIL — PROXIMATE CAUSE. —** When a person has been put in sudden peril by the negligent act of another, and in an instinctive effort to escape from that peril falls upon another, the negligent act is the proximate cause of the injury, and it is immaterial that under different circumstances he might and ought to have seen and avoided the latter danger. *Vallo v. United States Express Co.*, 741.
26. **COMMON CARRIERS — PRESUMPTION OF NEGLIGENCE. —** AN INJURIOUS ACCIDENT alone raises a *prima facie* presumption of negligence on the part of the carrier, and devolves upon him to disprove such negligence. *Buck v. Pennsylvania R. R. Co.*, 800.
27. **COMMON CARRIER — CONTRACT LIMITING LIABILITY — NEGLIGENCE, WHEN QUESTION FOR JURY. —** When goods of a delicate and fragile character are shown to have been shipped in good order, and delivered in bad order, under a contract limiting the carrier's liability, and it is also shown that the goods were carefully packed, and liable to break, with the most careful handling, and that there was no collision or wreck during their transportation, the carrier is entitled to have the question of negligence considered by the jury, with proof on his part as to just

- how the accident happened, to relieve him of the presumption of negligence arising from its occurrence. *Buck v. Pennsylvania R. R. Co.*, 800.
12. **PRESUMPTION OF, FROM ACCIDENT.** — Negligence is not presumed against a common carrier from the mere happening of an accident, when the accident is due to an independent cause, and not to the failure of any of the appliances of transportation. *Long v. Pennsylvania R. R. Co.*, 732.
13. **PROXIMATE CAUSE—SUDDEN PERIL.** — When a person passing along a sidewalk in a city is so suddenly put in peril by seeing a trunk pitched toward him from defendant's delivery wagon as to leave no time for consideration of the way of escape, and under the circumstances it is natural for him to instinctively retreat in the direction of an obstruction placed upon the sidewalk by defendant, and having his eye fixed upon the danger from which he is fleeing, he falls over such obstruction, the negligent throwing of the trunk is the proximate cause of the injury. *Vallo v. United States Express Co.*, 741.
20. **CONCURRENCE OF CAUSES APPLIES TO MUNICIPALITIES.** — The rule that of the concurrence of an ordinary cause with the negligence a party will not relieve him from responsibility for the resultant injury applies as against municipal and quasi municipal corporations, as well as to private persons and corporations. *Scharffer v. Jackson Township*, 792.
- See **BANKS**, 10-13; **CARRIERS**, 1, 6, 10, 11; **DAMAGES**, 9, 11; **EVIDENCE**; **FRAUD**; **HIGHWAYS**, 3-5; **INSURANCE**, 6; **JOINT LIABILITY**; **JUDGMENTS**, 1; **LIBEL**, 2; **MASTER AND SERVANT**, 6, 8; **MUNICIPAL CORPORATIONS**, 17-19; **PARENT AND CHILD**, 2; **RAILROADS**, 3, 6, 7, 9, 19, 22, 26, 36-38, 40-42; **REAL PROPERTY**, 3, 5; **TELEGRAPHS**, 9; **WAREHOUSEMEN**; **WATER COMPANIES**.

NEGOTIABLE INSTRUMENTS.

1. **TOWN ORDERS ARE NOT STRICTLY COMMERCIAL PAPER**, but, when negotiable, may be transferred as if they were. *Willis v. French*, 416.
2. **ONE IS A HOLDER OF A NOTE FOR VALUE IN DUE COURSE OF TRADE** if he takes it as a consideration for his indorsement of another note. *Roach v. Woodall*, 883.
3. **CONSIDERATION.** — **PROMISSORY NOTE GIVEN FOR MONEYS WHICH THE MAKER HAS EMBEZZLED** is founded upon a good consideration, and cannot be avoided on the ground that it was procured by threatening to prosecute him for his embezzlement. *Thorn v. Pinkham*, 335.
4. **INDORSER OF TOWN ORDERS, LIABILITY OF.** — A payee of a negotiable instrument transferring it by indorsement either before or after maturity, whether it be strictly commercial paper or not, as town orders, thereby guarantees the genuineness of the writing and the validity of the promise. If the writing is forged, or void, or *ultra vires*, the indorsee has the right to elect either to rely upon the contract of indorsement or to sue for the consideration paid. In the latter event, the statute of limitations runs from the date of the payment of the money, and in the former, from the time when the indorsed promise becomes due. *Willis v. French*, 416.
5. **IF AN INDORSEMENT IS FORGED BY ONE LAWFULLY IN POSSESSION** of a note, which cannot be transferred without indorsement, and he transfers it, so indorsed, to an innocent purchaser for value, the latter does not acquire any title thereto. *Roach v. Woodall*, 883.
6. **ASSIGNMENT BEFORE MATURITY — RIGHTS OF PARTIES.** — The maker of a negotiable note cannot assume that it has not been assigned or transferred, and, by making payment thereof before maturity to the original

holder, defeat the rights of a purchaser for value before maturity. *Williams v. Keyes*, 438.

7. **AN ACCOMMODATION INDORSEE** of a promissory note who, after it is dishonored, takes it up or otherwise acquires title to it holds it with the same rights as were held by the original payee, and cannot, on the ground that it was partly paid by the discharge of his own demand to the holder of the note, be affected by any equitable defense which could not have been asserted against the latter. *Breckenridge v. Lewis*, 353.

8. **TRUST FROM CONFIDENTIAL RELATION — UNCLE AND NEPHEW — VOID TRANSACTION.** — When a man, eighty-three years old, goes to reside with his nephew, conferring upon the latter, by letter of attorney, full power to manage his estate, worth about nine thousand dollars, and a few months thereafter gives the nephew his note for seven thousand dollars, in consideration for past services, and care during the remainder of his life, such note is void, in the absence of affirmative proof by the beneficiary of past services rendered, or a contract for future maintenance, and that the maker was fully informed of the contents of the note, the effect to result from his signing it, what proportion of his estate would be required to pay it, and the amount remaining to pay legacies provided for in his will. *Darlington's Estate*, 776.

See AGENCY, 1; BANKS; FRAUD, 2; LIBEL, 1, 2; MORTGAGES, 2-4; SURETSHIP, 7-9.

NEW TRIAL

JURY TRIAL. — IF OBJECTIONABLE STATEMENTS AND ARGUMENTS ARE MADE BY COUNSEL, which he subsequently withdraws, and which the court instructs the jury to disregard, they do not constitute grounds for a new trial. Such statements or arguments cannot be reviewed or otherwise considered upon appeal, when it is admitted that the trial court committed no error in respect to them, and ruled properly when its attention was directed thereto. *Alabama etc. R. R. Co. v. Frasier*, 28.

See APPEAL, 7; PERJURY, 3; STATUTES, 5.

NOTARIES PUBLIC.

See LIBEL, 1, 2.

NOTICE

1. **NOTICE OF FACTS EXHIBITED IN PUBLIC RECORD, PARTIES BOUND TO TAKE.** — Parties are bound, in the absence of fraud, to take notice of facts exhibited in a public record. *Backer v. Pyna*, 231.

2. **FALSE REPRESENTATION AS TO FACT CONTAINED IN PUBLIC RECORD MAY BE RELIED UPON.** — A false representation made for a fraudulent purpose may be relied upon by the party to whom it is made, although the representation is of a fact contained in a public record. *Backer v. Pyna*, 231.

See BANKS, 7; CARRIERS, 4; CHATTEL MORTGAGES; FRAUD, 2; INSURANCE, 5; JUDICIAL SALES, 1; MASTER AND SERVANT, 1-4, 12; MORTGAGES, 4; MUNICIPAL CORPORATIONS, 7, 20, 21, 31; PLEDGE; SURETSHIP, 3; TRAMPAGE, 2.

NUISANCE

See ANIMALS, 1.

OFFICERS.

1. **DE FACTO OFFICER, PERSON ACTING UNDER APPOINTMENT IS, WHEN.** — A person acting as a deputy sheriff, under appointment by the sheriff, is a *de facto* officer, although he has not qualified as prescribed by law, and, as between third persons, his acts must be held valid. *Alabama etc. Ry Co. v. Bolding*, 541.
 2. **OFFICER, RIGHT OF, TO HOLD OVER UNTIL QUALIFIED SUCCESSOR ELECTED.** — Where an officer is lawfully in the possession of an office, under a constitutional or statutory provision to the effect that he shall hold until his successor is elected and qualified, his right to hold over continues until a qualified successor has been elected by the same electoral body as that to which he owes his election, or which, by law, is entitled to elect a successor. *Kimberlin v. State*, 208.
 3. **APPOINTMENT TO OFFICE VOID WHEN NO VACANCY EXISTS.** — An appointment to fill a vacancy in an office in which no vacancy exists is void. *Kimberlin v. State*, 208.
 4. **VACANCY IN OFFICE DOES NOT OCCUR WHERE PERSON ELECTED DIES BEFORE HE QUALIFIES.** — No vacancy in an office occurs where the person elected to fill it dies before he qualifies, or dies after the polls are closed, and before the result has been ascertained. *Kimberlin v. State*, 208.
- See ACKNOWLEDGMENT, 1, 3, 4, 6-13; BANKS, 10, 15; ELECTIONS, 5-8; EXECUTION, 1; HIGHWAYS, 2, 3; MANDAMUS; MUNICIPAL CORPORATIONS, 16, 23, 24, 30; RAILROADS, 9, 10; REPLEVIN; SURETYSHIP, 11.

ORIGINAL PACKAGES.

See INTERSTATE COMMERCE.

OPTION.

See CONTRACTS, 1; VENDOR AND PURCHASER.

ORDERS.

See NEGOTIABLE INSTRUMENTS, 1, 4.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 7, 11.

PARENT AND CHILD.

1. **AN ADOPTED CHILD TAKES A LEGACY** given to one of its adopted parents, who dies before the testator, where the statute authorizing the adoption declares that the child becomes, to all intents and purposes, the child of its adopters, the same as if born to them in lawful wedlock. *Warren v. Prescott*, 370.
2. **JUDGMENT — RECOVERY BY MINOR AS BAR TO PARENT'S ACTION.** — When an action by a minor son for negligent injuries is prosecuted by his father as his next friend, a recovery for the value of the services of the son during his minority, insisted upon by the father as an element of damages, is a bar to a subsequent action to recover for the loss of such services, brought by the father in his own name; but such recovery will not bar the right of the father to recover the amount expended for the son in nursing, medicine, and medical attendance, in the absence of contrib-

utory negligence on the part of the son or his parents. *Baker v. First etc. R. R. Co.*, 471.

See DEVISE, 3; FRAUD, 4; FRAUDULENT CONVEYANCES, 6-8; MASTER AND SERVANT, 1.

PAROL EVIDENCE.

See SALES, 2; WILLS, 2.

PARTIES.

See PLEADING, 4, 9, 10; TRUSTS.

PARTITION.

PARTITION OF BUILDING, STORIES OF WHICH ARE OWNED BY DIFFERENT OWNERS, NOT DECREED WHEN. — Where land is purchased and a building is erected thereon by three parties under an agreement that one shall own and use the land and the first story, the second shall own and use the second story, and the third shall own and use the third story, with the right of ingress and egress, there can be no partition among the parties. *Anderson School Tp. v. Milroy Lodge*, 206.

See CO-TENANCY.

PARTNERSHIP.

SHARING IN PROFITS AS CREATING. — When one party agrees, in writing, with another, in consideration of a share of the profits in a business in which the latter is to embark, and not as a contribution to the capital of a partnership, to furnish him with a certain sum of money, from time to time, its repayment to be secured by chattel mortgage, with an option to repay before the expiration of the full term in which it may be demanded, the party thus furnishing the money to have no control of the business, in which there is to be no partnership except as to the profits, such agreement does not create a partnership as to third persons, but merely creates the relation of borrower and lender between the parties to it. *Waverly Nat. Bank v. Hall*, 823.

See BANKS, 14; CARRIERS, 9; CONTRACTS, 5; CORPORATIONS, 6; FRAUD, 4.

PAYMENT.

See BANKS, 1-4, 7-9; CONTRACTS, 10; FRAUDULENT CONVEYANCES, 5-8; JUDGMENTS, 8; MORTGAGES, 3, 4, 8, 10; NEGOTIABLE INSTRUMENTS, 6; PLEDGE; SURETYSHIP, 7, 9.

PENALTY.

See TELEGRAPHS, 6.

PERJURY.

1. **ADMISSIBILITY OF EVIDENCE** — On the trial of an indictment for perjury, evidence is admissible to show that the accused, in a private interview, endeavored to influence a third person to give false evidence in the same case and in respect to the same matter in which the alleged perjury was committed. *Heflin v. State*, 147.
2. **ADMISSIBILITY OF DECLARATIONS** — The whole *res gestæ* of a transaction, including declarations made at the time by the participants, are admissible against one accused of perjury to show that his sworn statements

as to some of the particulars of such transaction were false. *Heflin v. State*, 147.

3. **ERRONEOUS INSTRUCTIONS.** — When, upon a trial for perjury, alleged to have been committed on the trial of a case in a court of record, the judicial proceedings in that case are not formally proved by the production the record therein, or by an authenticated copy thereof, and such formal proof is not waived, instructions based upon the hypothesis that the case wherein the alleged perjury was committed has been duly proved by other evidence are erroneous, and entitle the accused, if convicted, to a new trial. *Heflin v. State*, 147.

4. **RECORD NECESSARY TO CONVICTION.** — To convict a person of perjury, alleged to have been committed on the trial of a case in a court of record, the production of the record in that case, or of a duly authenticated transcript thereof, is essential, unless the formal proofs of such judicial proceeding are waived or dispensed with by admission or otherwise. *Heflin v. State*, 147.

See JUDGES.

PERPETUITIES.

See DEVISE, 1; TRUSTS, 4.

PERSONAL PROPERTY.

See FRAUDULENT CONVEYANCES, 1; INSURANCE, 1; LARCENY, 2; REPLEVIN.

PERSONAL RIGHTS.

See MUNICIPAL CORPORATIONS, 2.

PHYSICAL EXAMINATION.

See TRIAL, 14.

PHYSICIANS AND SURGEONS.

See DAMAGES, 11; FRAUD, 4; MALICIOUS PROSECUTION, 7; WITNESSES, 7.

PIERS.

See WHARVES.

PLEADING.

1. **COMPLAINT IN ACTION TO RESTRAIN SPOILIATION OF BURIAL-PLACE, SUFFICIENCY OF.** — A complaint in an action to restrain the defendant from removing grave-stones and interfering with a family burial-ground, which alleges that the father of the plaintiffs, together with his brothers and sisters, owned, as tenants in common, the farm upon which said family burial-ground is laid out, wherein the ancestors and collateral relatives of the plaintiffs had from time to time been buried, and their graves marked by mounds and memorial stones; that said co-tenants conveyed said farm to the person from whom the defendant derails her title, "excepting and reserving the right of interment" in said lot, "and also a right of way to the same, to all the grantors of this deed, and to their heir or heirs forever"; that the father of plaintiffs and all the grantors in said deed are now dead, and said reserved right of family burial has descended to the plaintiffs as heirs at law of the grantors in

said deed; that the defendant holds the farm subject to said reservation and exception; and that she has removed a part of the fence inclosing the burial-ground, destroyed some of the grave-stones marking the graves of the ancestors and relatives of the plaintiffs, graded away the mounds of the graves and obliterated all traces of them, and refuses a right of way to the plaintiffs to and from said ground, and threatens, by grading and leveling, to destroy it as a burial-place,—states facts sufficient to constitute a cause of action. *Mitchell v. Thorne*, 699.

2. **BILL FOR RELIEF AGAINST USURIOUS CONTRACT DEMURRABLE WHEN.** — A bill seeking relief against a usurious contract is demurrable if it fails to show an offer by the complainant to do that equity without which the court will deny relief. *American Freehold Land etc. Co. v. Jefferson*, 587.
3. **JOINDER OF PLEAS — GENERAL DEMURRER.** — When a good and a bad plea are joined, both should not be stricken out on general demurrer. *Munnerlyn v. Augusta Sav. Bank*, 159.
4. **DEMURRER ON GROUND OF DEFECT OF PARTIES MUST SPECIFICALLY POINT OUT PARTICULAR DEFECT.** — When a demurrer to a complaint is based on the ground that there is a defect of parties plaintiff or defendant, the particular defect relied on must be pointed out specifically. *Mitchell v. Thorne*, 699.
5. **JOINT GENERAL DEMURRER** by two defendants to a declaration which sets forth a good cause of action as to either of them should be overruled. *May v. Jones*, 154.
6. **ERROR WITHOUT PREJUDICE.** — If two pleas are in legal contemplation the same, and the court sustains a demurrer to one and allows the other to stand, the defendant is not injured thereby. *Alabama etc. R. R. Co. v. Frazier*, 28.
7. **STATUTE OF LIMITATIONS.** — A DEMURRER will be sustained to a complaint if it appears therefrom that the alleged cause of action is barred. *Rice v. Moore*, 318.
8. **DEMURRER, OVERRULING OF, NOT REVERSIBLE ERROR WHEN.** — The overruling of a demurrer to a plea cannot be reversible error, where the defenses set up are substantially availed of under other pleas. *Alabama etc. R'y Co. v. Brooks*, 528.
9. **DEMURRER TO COMPLAINT INTERPOSABLE ONLY FOR OBJECTIONS APPEARING ON ITS FACE.** — A demurrer to a complaint can be interposed only for objections appearing on its face. Where, therefore, a plaintiff sues as heir of a deceased person, a demurrer to the complaint on the ground that other heirs are not made parties cannot be sustained, unless it appears from the complaint that there are other heirs. *Mitchell v. Thorne*, 699.
10. **EQUITY PLEADING — PARTIES.** — When a cause of complaint is one common to all the plaintiffs, the right under which all claim is precisely the same as to each, the complaint of all is against the same defendant for the doing of acts which affect all alike and in the same manner, the defense set up is common to all the plaintiffs, and the testimony, proofs, and decree are alike as to all of them, a bill filed by several such plaintiffs against a common defendant is not multifarious. *Raferty v. Central Traction Co.*, 763.

See JUDGMENTS, 12; LIBEL, 2; RAILROADS, 2, 15, 19; TELEGRAPHS, 1; TROVER, 2.

PLEDGE.

PLEDGER IS NOT GUILTY OF CONVERSION of stock pledged to him, if he sells it without giving notice to the pledgor and reports the sale as being made to another person, who surrenders the certificate and obtains new ones in his own name, if such person never paid anything, and his name was used by the pledgee to effect the sale for the latter's interest, and the stock was always in the possession of such pledgee, and he, on learning that the sale was invalid for want of notice to the pledgor, thereafter gave new notice to the latter, and under such notice sold the stock and applied the proceeds towards the payment of the debt secured by the pledgor. *Terry v. Birmingham Nat. Bank*, 87.

See **DAMAGES**, 3; **EVIDENCE**, 12; **FRAUDULENT CONVEYANCES**, 1.

POLICE.

See **MALICIOUS PROSECUTION**, 17.

POLICE-OFFICER.

See **MUNICIPAL CORPORATIONS**, 6.

POLICE POWER.

See **LEGISLATURE**, 1; **MUNICIPAL CORPORATIONS**, 7, 14.

POLLUTION.

See **DAMAGES**, 7; **WATERCOURSES**, 4, 5.

POSTPONEMENT.

See **TRIAL**, 1.

POWER OF ATTORNEY.

See **AGENCY**, 2; **EVIDENCE**, 12; **NEGOTIABLE INSTRUMENTS**, 6.

PREFERENCES.

See **BANKS**, 14; **DEBTOR AND CREDITOR**, 2.

PRESCRIPTION.

See **WATERCOURSES**, 4.

PRESUMPTION.

See **ACKNOWLEDGMENT**, 2, 4, 7, 10; **CARRIERS**, 4, 11; **FRAUDULENT CONVEYANCES**, 5, 9; **HIGHWAYS**, 2; **MALICIOUS PROSECUTION**, 15, 16; **MASTER AND SERVANT**, 9, 11, 12; **NEGLIGENCE**, 6, 7, 16-18; **RAILROADS**, 7; **RAPE**, 2; **WATERCOURSES**, 2.

PRINCIPAL AND AGENT.

See **AGENCY**, 1.

PRIVILEGED COMMUNICATIONS.

See **LIBEL**, 4, 5.

PRIVITY.

See **WATER COMPANIES**, 2.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION, 3-6, 9-16.

PROCESS.

1. **SUMMONS, SERVICE OF, ON AGENT OF CORPORATION SUFFICIENT.** — Service of summons on the station agent of a railroad company is sufficient to authorize a judgment against the corporation, whether its principal place of business is in the county in which the action is brought or not. *Alabama etc. R'y Co. v. Bolding*, 541.

2. **MISNOMER — PERSON SUED AND SERVED BY WRONG NAME CANNOT DISREGARD SUMMONS.** — A person summoned by a wrong name, who is thereby informed that he is sued, although not correctly described by his true name, if he appears and does not plead misnomer, waives it, and will be bound by a judgment in the wrong name. In the application of this rule, no distinction is made between natural persons and corporations. *Alabama etc. R'y Co. v. Bolding*, 541.

See ATTACHMENT, 2; JUDGMENTS, 12; JURISDICTION; LIMITATIONS OF ACTIONS, 2.

PROFITS.

See PARTNERSHIP.

PROPERTY RIGHTS.

See MUNICIPAL CORPORATIONS, 2.

PROSPECTIVE PROFITS.

See DAMAGES, 1.

PROTEST.

See BANKS, 2, 4; LIBEL, 1, 2.

PUBLICATION.

See LIBEL, 1, 3; WILLS, 1-3.

PUBLIC POLICY.

See DEVISE, 3.

PUBLIC WAYS.

See WHARVES.

RAILROADS.

1. **CONSOLIDATION OF RAILWAY COMPANIES, RIGHTS ACQUIRED BY.** — When the legislature authorizes the consolidation of two or more railway companies, the consolidated company succeeds to the property of each of the companies held by it before the consolidation. *Louisville etc. R'y Co. v. Blythe*, 599.

2. **A RAILROAD CORPORATION'S LIABILITY AS A COMMON CARRIER TERMINATES** when the goods are safely stored in its depot. *Railroad v. Kelly*, 902.

3. **DAMAGE. — MEASURE OF DAMAGES** when goods shipped over railway are destroyed through the negligence of a corporation is their value at the place where they are stored. *Railroad v. Kelly*, 902.

4. **COMMON CARRIERS — REGULATIONS AS TO STORAGE IN CARS.** — When the customers of a carrier by railway have the privilege of unloading cars in which their freight is shipped, the carrier may adopt and enforce a reasonable regulation as to the time within which the cars may be unloaded by customers without any storage charges, and fix a reasonable rate of storage per day to be charged for the use of the cars so long as they remain unloaded beyond the time fixed by the regulation for free storage. *Miller v. Georgia R. R. etc. Co.*, 170.
5. **COMMON CARRIERS — REGULATION AS TO STORAGE IN CARS — WHEN REASONABLE.** — A regulation made by a railway company, by which it charges freight storage on each car at the rate of one dollar per day for every day that the car remains unloaded, after a reasonable and fixed time is given in which to unload it free of charges for storage, is not rendered unreasonable because cars are of different sizes and capacity, nor because fractions of a day are charged for as a whole day, nor because the rate of storage in warehouses and elevators is less. On the contrary, such regulation is reasonable and valid. *Miller v. Georgia R. R. etc. Co.*, 170.
6. **A RAILROAD CORPORATION IS LIABLE AS A WAREHOUSEMAN FOR THE LOSS OF GOODS IN ITS DEPOT BY FIRE,** if before such fire they were called for by the consignee, who was falsely informed by the employees of the corporation that the goods had not been received, and he was thereby prevented from removing them. Though the giving of this false information did not occasion the fire by which the goods were destroyed, it did cause them to be left in the depot to be consumed by such fire. Notwithstanding the fire, the goods would not have been lost but for the wrong and negligence in denying that they had been received. *Railroad v. Kelly*, 902.
7. **NEGLIGENCE PRESUMED FROM HAPPENING OF INJURIOUS ACCIDENT WHEN.** — When a person passing along a street under an elevated railroad is struck and injured by a broken bolt attached to an iron plate or clip, which falls upon him from the structure above, a presumption arises that there was negligence on the part of the railway company in permitting the structure to get out of repair; and this presumption is not overcome by the testimony of its track-walker and inspector, to the effect that it was his duty to examine carefully all the rails, switches, signals, bolts, and fastenings of all kinds, and to keep them tight, and that he performed this duty to the best of his ability. But even if this evidence were sufficient to remove the presumption, still the credibility of the witness would be involved, and be a question for the jury, since he would be a person interested, and possibly actuated by a motive to shield himself from blame, and it would be error to direct a verdict for the company. *Volkmar v. Manhattan R'y Co.*, 678.
8. **ACCIDENT.** — In an action for personal injuries suffered through the derailment of a train of cars in which plaintiff was a passenger, evidence is admissible which tends to prove that rails and cross-ties in the neighborhood, as well as those where the accident occurred, were old, rotten, and decayed. Such evidence is competent, both because the defective ties and rails may have imparted an irregular motion to the cars and contributed to the accident, and because it supports an inference that defendant's employees knew of the perilous condition of the track, including the portion consisting of the broken rail and the ties beneath it where the derailment took place. *Alabama etc. R. R. Co. v. Hill*, 65.

8. **DAMAGES. — EXEMPLARY DAMAGES MAY BE AWARDED IN AN ACTION AGAINST A RAILROAD CORPORATION** for personal injuries received, if the negligence was of such a character and degree as to evince a grossly careless disregard of the safety of the public. Hence such damages may be awarded when injuries have been received by a passenger from the derailment of a train, and every other cross-tie within twenty-five to thirty feet was so rotten that the spikes could be pulled out by hand, and had been in this condition for at least two weeks, and there was evidence tending to show that the condition of such ties was known to the officers of the defendant. *Richmond etc. R. R. Co. v. Vance*, 41.
10. **DAMAGES. — EXEMPLARY DAMAGES** should not be awarded against a railway corporation because of the derailment of a train on account of rotten cross-ties, aided by a broken bolt, if there is no evidence that defendant's officers or agents knew of any defect in the bolt. When an injury is produced by the co-operation of two independent causes, the existence of one of which is unknown, and the other is insufficient to produce the result without the co-operation of the unknown cause, knowledge of the existence of the other cause does not make a case for the allowance of punitive damages. *Richmond etc. R. R. Co. v. Vance*, 41.
11. **DAMAGES. — EXEMPLARY DAMAGES** may be awarded to one receiving personal injuries while a passenger on a railway car from its derailment, if the condition of the rails and cross-ties and the fact that old rails were being used constantly to repair the old track satisfy the jury that the rails used in the track were old and the cross-ties decayed and rotten, and that the defendant knew of their condition and was guilty of recklessness and wantonness in continuing to run trains over a track in so dangerous a condition. *Alabama etc. R. R. Co. v. Hill*, 65.
12. **NEGLIGENCE. — EXEMPLARY DAMAGES** may be imposed, though there is not an entire want of care in the maintenance of a railway track upon which a passenger train is derailed, if, notwithstanding the exercise of some care, the track is consciously left in such a condition that to run trains over it would probably result in the disaster which occurred. *Alabama etc. R. R. Co. v. Hill*, 65.
13. **DAMAGES. — EVIDENCE THAT THE PLAINTIFF HAD HER INFANT IN HER ARMS** when, after being taken past her station, her request that the train return to such station was refused, and she was directed to get off in a driving rain, where there was no shelter, is admissible, because it tends to aggravate the wrong of the conductor in requiring the plaintiff to leave the train where there was neither station nor shelter. *Alabama etc. R. R. Co. v. Sellers*, 17.
14. **EXEMPLARY DAMAGES. — IF A CONDUCTOR OF A RAILWAY COMPANY**, acting within the range of his employment, after having passed a station without allowing a passenger to alight, willfully refuses to return with the train to such station, and compels the passenger, who is a woman encumbered with her baby and baggage, to alight, in a driving rain, two hundred yards from such station, and from any shelter, whereby she is unnecessarily exposed to the elements while walking that distance, to the injury of her health, this misconduct on the part of such conductor is such willful wrong, and is accompanied with such reckless disregard of consequences, necessarily injurious, as authorizes the jury to award exemplary damages. *Alabama etc. R. R. Co. v. Sellers*, 17.
15. **PLEADING — DAMAGES FOR CARRYING PASSENGER BEYOND HIS STATION. —** When, in an action against a railroad corporation, the complaint al-

- leges wrong and negligence in failing to stop at a station to permit a passenger to alight, and that after such station was passed, the conductor refused to return to it, and directed the passenger to get off in a driving rain, the damages recoverable cannot be limited to those arising from the failure to stop at the station in the first instance, but include those resulting from the refusal to return, and from directing plaintiff to alight in the rain. *Alabama etc. R. R. Co. v. Sellers*, 17.
16. A PASSENGER ON A FREIGHT TRAIN is entitled to be set down at the station to which he has purchased a ticket, and may recover damages for being carried beyond such station and compelled to alight several hundred yards therefrom in a driving rain, and at a place where there was no shelter, precisely the same as though the train were one used exclusively for passengers. *Alabama etc. R. R. Co. v. Sellers*, 17.
17. EXPULSION FROM TRAIN. — One does not necessarily leave a train voluntarily, though no actual force is employed to put him off. He may be coerced by the direction of the conductor that he alight, and by the fact that if he does not do so, he will be carried still farther beyond the station of his destination. *Alabama etc. R. R. Co. v. Sellers*, 17.
18. PLEADING. — AN AVERMENT THAT THE PLAINTIFF WAS PUT OFF, OR COMPELLED TO GET OFF, of a railway train at a point beyond the station of her destination may be supported without proof of the use of force, as by evidence showing that after carrying plaintiff past such station the conductor of the train refused to return thereto, and directed plaintiff to alight, and it was necessary to leave the train to avoid being carried a still greater distance from the station. *Alabama etc. R. R. Co. v. Sellers*, 17.
19. PLEADING — NEGLIGENCE. — In an action against a railroad company for injuries caused in operating the road, the plaintiff need not aver the particular defect in the condition of the track or machinery in which the negligence consisted. *Richmond etc. R. R. Co. v. Vance*, 41.
20. DAMAGES. — EXEMPLARY DAMAGES MAY BE ALLOWED AGAINST A RAILWAY CORPORATION FOR AN ASSAULT AND BATTERY on the person of the plaintiff by defendant's brakeman, because the plaintiff, though not rightfully on the train, would not undertake to get off while it was running at such a rate of speed as to render the attempt hazardous. *Alabama etc. R. R. Co. v. Frazier*, 28.
21. RAILROAD CORPORATION'S LIABILITY FOR ACTS OF BRAKEMAN. — If a brakeman is sent by the conductor to inform a person on the train that he must get off, which the brakeman does, and such person not complying with the demand that he get off, because the speed of the train was such as to render any attempt to leave it dangerous, the brakeman, in the presence of the conductor, thereupon commits an assault and battery on such person to coerce his will so that he would get off, the act of the brakeman is within the line of his duty, and the corporation is answerable therefor. *Alabama etc. R. R. Co. v. Frazier*, 28.
22. RAILROAD CORPORATION IS ANSWERABLE FOR WILLFUL MISCONDUCT OF ITS EMPLOYEE, if he, while acting within the range of his employment, does an act injurious to another, either through negligence, wantonness, or intention; but if he go beyond the range of his employment, and of his own will do an unlawful act injurious to another, his employer is not liable therefor. *Alabama etc. R. R. Co. v. Frazier*, 28.
23. EVIDENCE — BURDEN OF PROOF. — If, in an action for an assault committed on the plaintiff by a brakeman of a railway train, the defendant pleads

that the force used was necessary to remove the plaintiff from the train, the defendant must assume the burden of proving the necessity of the force employed. *Alabama etc. R. R. Co. v. Frazier*, 28.

24. **EVIDENCE — RES GESTÆ.** — In an action against a railroad company to recover damages for an assault and battery committed by a brakeman on a person not rightfully on the train, in which he claims that the assault was without justification or palliation, and the brakeman that it was committed under apprehension of an attack by the plaintiff, all that occurred between plaintiff on one hand and the conductor and brakeman on the other — the manner, language, and conduct of the parties just before and leading up to the assault — constitute part of the *res gestæ*, and evidence of them is admissible. *Alabama etc. R. R. Co. v. Frazier*, 28.
25. **EXPRESS-MESSENGER, RAILROAD COMPANY NOT LIABLE FOR WRONGFUL ACTS OF.** — An express-messenger on a railway train is not the servant of the railroad company, and the company is not, therefore, liable for his wrongful acts. *Louisville etc. R'y Co. v. Douglass*, 582.
26. **RAILROAD CORPORATIONS ENGAGED IN CARRYING LIVE-STOCK** cannot, by contract, exempt themselves from liability for their own negligence. *Railroad v. Dies*, 871.
27. **RAILROAD CORPORATIONS — SHIPPER, WHEN NOT ESTOPPED BY HIS CONTRACT.** — Agreement, in a contract for the shipment of live-stock, that the shipper has examined and found in good order the cars provided for transportation of his stock, and accepts the same, and agrees that they are suitable and sufficient, does not estop him from proving that such stock was injured by a defect in one of the cars, nor from recovering damages sustained from such defect. *Railroad v. Dies*, 871.
28. **RAILROAD CORPORATIONS USING CARS OF OTHER CORPORATIONS. — CARRIER CANNOT ESCAPE RESPONSIBILITY** by carrying its freight in cars furnished by or owned by another corporation. *Railroad v. Dies*, 871.
29. **RAILROAD CORPORATIONS SHIPPING STOCK IN "PALACE HORSE-CAR,"** procured from another corporation at the request of the shipper, is nevertheless liable for any injury resulting to stock from a defect in such car. *Railroad v. Dies*, 871.
30. **RAILROAD COMPANY CARRYING LIVE-STOCK NOT JUSTIFIED IN REFUSING TO LAY OUT CAR WHEN.** — Where it is found that cattle being transported in a railroad car with hogs are suffering, the conductor of the train is not justified in refusing, upon the shipper's request, to lay out the car at a station, merely because the stock-pen at that station is unsafe for hogs, it not appearing that the cattle could not be separately unloaded, or that the railway company was under no duty of having a pen safe for hogs as well as for cattle. *Johnson v. Alabama etc. R'y Co.*, 534.
31. **RECKLESS INJURY OF TRESPASSERS. — IF ONE WHO WALKS UPON A RAILROAD TRACK** about midway of a trestle one hundred feet long and fifteen to twenty feet high is seen by the engineer of an approaching train, which could have been stopped by prompt action on the part of such engineer in time to prevent injury to the person on the track, and the engineer speculates upon the chances of the latter's reaching the end of the trestle before the train does, until it is too late to stop the train, and he is run over and killed, the railroad corporation is answerable in damages, because it was recklessness for engineers to speculate upon such chances. *Central R. R. etc. Co. v. Vaughan*, 50.

32. **RAILWAY CORPORATIONS — TRESPASSERS, DUTY TO.** — An Engineer in charge of a railway train does not owe a duty to trespassers to keep any special lookout for them, or to withdraw his lookout from the track in front of his engine, to look across the country to a trestle to see whether there is any one thereon. Hence it is error to admit evidence showing that by so looking the trespasser on such trestle could have been seen in time to avoid injury to him. *Central R. R. etc. Co. v. Vaughan*, 50.
33. **LIABILITY OF, FOR KILLING STOCK.** — If stock, from being frightened by a moving train, run upon a trestle, from which they fall, and are thereby killed, the railroad corporation is not liable therefor under a statute imposing liability for stock, the killing or crippling of which is caused by any moving train, or engine, or cars. *Railroad v. Sadler*, 896.
34. **CONSIDERATION, ERECTION, AND MAINTENANCE OF RAILWAY STATION ON LAND IS VALUABLE.** — The erection and maintenance of a railway station on land of a ward conveyed by his guardian to the company is a valuable consideration for such conveyance. *Louisville etc. R'y Co. v. Blythe*, 599.
35. **STREET-RAILWAYS — RIGHT TO USE OF STREET.** — The right of a railway in a street is only an easement to use the highway in common with the public. It has no exclusive right of travel upon its track, and it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle. *Rascher v. East Detroit etc. R'y Co.*, 447.
36. **STREET-RAILWAYS — RIGHT TO DRIVE ON TRACK.** — A person is not negligent nor a trespasser in driving upon a street-railway track in the night-time. He has the same right to travel upon it as the railway company, save that it is his duty, when he meets a car, to get off and give the car precedence. *Rascher v. East Detroit etc. R'y Co.*, 447.
37. **STREET-RAILWAYS — LIABILITY AT CROSSING — DUTY OF TRAVELER TO LOOK AND LISTEN.** — A person about to cross a street-railway track need not stop, but he must look and listen, so as to avoid walking or driving directly in front of a moving car; and if he fails to so look and listen, he is guilty of contributory negligence, and cannot recover for injuries resulting from being struck by the car. *Carson v. Federal Street etc. R'y Co.*, 727.
38. **STREET-RAILWAYS — LIABILITY AT CROSSINGS — CONTRIBUTORY NEGLIGENCE OF SERVANT.** — When a wagon is crushed at a crossing by collision with a street-car, caused by the negligence of the driver of the wagon, who is in the employ of its owner, such owner is affected by the negligence of his servant, and cannot recover for the injury. *Carson v. Federal Street etc. R'y Co.*, 727.
39. **STREET-RAILWAYS — RIGHT TO USE OF STREET — DUTY TO AVOID COLLISION.** — The superior right of a street-railway company to the use of that portion of the highway designated for its use must be exercised with due caution and regard for the rights of travelers thereon; and the fact that it has a prescribed route does not alter its duty to the public, who have a right to travel upon its track until met or overtaken by its cars. *Rascher v. East Detroit R'y Co.*, 447.
40. **STREET-RAILWAYS — DUTY TO PREVENT COLLISION.** — As between a street-car company and the driver of a wagon or omnibus, the duty rests upon the company to furnish its cars with light at night, or give warning signals of approach, and if it fails in this duty, and does not run its cars so slowly as to avoid collision, it is guilty of negligence, if the driver of

the vehicle exercises reasonable and ordinary care. *Rascher v. East Detroit R'y Co.*, 447.

41. **STREET-RAILWAY — COLLISION WITH VEHICLE — EVIDENCE OF NEGLIGENCE.** — In an action to recover for injury received in a collision with a car while driving upon a street-railway track in the night-time, evidence is admissible to show that the public were in the habit of driving and traveling upon such track, as bearing upon the question of negligence in running a car at night without any head-light, or other light of any kind. *Rascher v. East Detroit R'y Co.*, 447.
42. **STREET-RAILWAYS — COLLISION WITH VEHICLE — NEGLIGENCE FOR JURY TO DETERMINE.** — In an action to recover for injury received in a collision with a car while driving upon a street-railway track in the night-time, the question of reasonable diligence and ordinary care to prevent collision on the part of the plaintiff, and of negligence on the part of the railway company, is for the jury to determine, under evidence showing that the car was not lighted, and was running at the rate of fifteen or twenty miles an hour, and that the plaintiff and another person, a short distance behind him, did not see the car until the collision was inevitable. *Rascher v. East Detroit R'y Co.*, 447.
43. **STREET-RAILWAYS. — TERMS "RAILWAY" AND "RAILROAD" ARE SYNONYMOUS,** and have no distinct and independent meaning in themselves. When either is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be deemed applicable to every species of road embraced in the general sense of the word used. Hence general authority to railroad companies to lease their property and franchises will include street-railway as well as steam-railroad companies. *Rafferty v. Central Traction Co.*, 763.
44. **STREET-RAILWAYS — RIGHT TO USE STREETS. — POWER TO LEASE AND OPERATE** the property and franchises of passenger-railway companies necessarily includes all the franchises, rights, and privileges of the company leased, and among these is, necessarily, such right to occupy streets and lay tracks as the leased company is possessed of. *Rafferty v. Central Traction Co.*, 763.
45. **STREET-RAILWAYS — RIGHT TO USE STREET.** — Under a statute providing that a street-railway company organized thereunder may lay tracks upon any street upon which "a passenger-railway now is or may hereafter be constructed," such company may enter and lay tracks upon streets not before occupied by passenger-railways. *Rafferty v. Central Traction Co.*, 763.
46. **STREET-RAILWAYS — LIABILITY FOR LEASE OF FRANCHISE — EXCESSIVE EXERCISE OF POWER.** — When a street-railway corporation has leased the property and franchises of another railway company, in excess of its lawful authority, it is liable therefor to the state, but not to private persons, unless they have sustained private injury, for which they are entitled to legal redress. *Rafferty v. Central Traction Co.*, 763.
47. **STREET-RAILWAYS. — RIGHT OF ABUTTING OWNER TO USE OF STREET** is the same after car tracks are laid thereon and the cars running as it was before. If, at any time, he has occasion for the presence of vehicles on the street in front of his property, to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purposes, and if, in such exercise of the right, the passage of

street-cars is impeded, they must wait. *Rafferty v. Central Traction Co.*, 763.

43. **STREETS — STREET-RAILWAYS NOT ADDITIONAL SERVITUDE.** — The authorized use of a public street for street-railroad purposes, no matter what the motor power may be, is not the imposition of an additional servitude, and does not entitle the abutting land-owners along the street to compensation for such use. *Rafferty v. Central Traction Co.*, 763.

See **CARRIERS**; **CORPORATIONS**, 4; **EMINENT DOMAIN**; **ESTOPPEL**; **EVIDENCE**, 6, 7; **INJUNCTIONS**, 1; **LEGISLATURE**, 2; **LIBEL**, 7; **MASTER AND SERVANT**, 5, 6; **MUNICIPAL CORPORATIONS**, 27, 28; **NEGLIGENCE**, 6; **PROCESS**, 1.

RAILROAD-AID BONDS.

See **ESTOPPEL**; **MUNICIPAL CORPORATIONS**, 27, 28.

RAPE.

1. **ASSAULT TO RAPE — EVIDENCE OF CAPACITY.** — At common law, a boy under the age of fourteen years cannot in point of law be guilty of an assault with intent to commit rape, and if he is under that age at the time of the alleged offense, evidence is inadmissible to show that in point of fact he could commit the offense. *McKinny v. State*, 140.
2. **ASSAULT TO RAPE. — A BOY UNDER THE AGE OF FOURTEEN YEARS** is always presumed to be incapable of being guilty of attempting to commit rape; and in those jurisdictions where such presumption may be rebutted by proof of capacity, the burden of such proof is upon the prosecution. *McKinny v. State*, 140.
3. **ASSAULT TO RAPE. — A BOY UNDER THE AGE OF FOURTEEN YEARS** cannot, under the statutes of Florida, be legally convicted of an assault to commit rape, in the absence of any evidence of his capacity to commit such offense. *McKinny v. State*, 140.

REAL PROPERTY.

1. **LAND-OWNER IS LIABLE FOR INJURIES TO STOCK RUNNING AT LARGE, OCCASIONED BY ERECTIONS OR EXCAVATIONS** so made on his land as to be obviously dangerous to animals straying thereon, where the right of animals to run at large is recognized by law. *Hurd v. Lacy*, 61.
2. **OWNER OF LAND IS LIABLE FOR INJURIES TO ANIMALS CAUSED BY A BARBED-WIRE FENCE** not constructed as an ordinarily prudent husbandman constructs such fences, if the right of such animals to run at large is recognized by law, and they stray upon such land and come into contact with such fence. *Hurd v. Lacy*, 61.
3. **CONTRACTOR DOING PUBLIC WORK UNDER AUTHORITY OF UNITED STATES NOT LIABLE FOR INJURY TO INDIVIDUAL WHEN.** — Where a contractor does public work in a proper and careful manner, under a contract with the government of the United States, which that government has authority to make, he is not liable for any injury, direct or consequential, to private property that may result therefrom. Where, therefore, a contractor, while blasting rocks in a navigable river, for the purpose of removing obstructions to navigation, under a contract with the United States government, injures a house, distant three thousand feet from the place of the explosion, the injury not being caused by casting any materials upon the premises, but simply by the vibrations of the earth or by the pulsations of the air, he is not liable for the injury in an action

brought against him by the owner of the house, without proof of negligence; and a charge to the jury that if the explosions injured the house, he is liable, without regard to the question of negligence, is error. *Banner v. Atlantic Dredging Co.*, 649.

4. **FIRES — DUTY AND LIABILITY OF MILL-OWNER IN RESPECT TO.** — When fires are liable to originate in the engine or boiler rooms of a saw-mill, and the construction of the mill is such that the surroundings are inflammable, so that fire is liable to spread rapidly when once ignited, it is incumbent upon the person operating the mill to take care that fire shall not consume it and spread to other property, by keeping on hand, not only persons to watch the fire and keep it within the furnace, but also some appliances for extinguishing fire, in case it should accidentally escape and ignite some part of the building. *McNally v. Cobwell*, 494.

5. **STREETS — RIGHT TO USE SIDEWALK FOR BUSINESS PURPOSES.** — Occupants of places of business upon a public street have a right to use the sidewalk in front of their premises in receiving and sending out merchandise, but they must exercise this right with a due regard to the safety of pedestrians; and what is such reasonable length of time as such persons may allow their property to remain upon the sidewalk without incurring the charge of negligence is for the jury to decide under the circumstances of each particular case. *Vallo v. United States Express Co.*, 741.

See **BOUNDARIES**; **FIXTURES**; **INSURANCE**, 1; **JUDGMENTS**, 3; **MECHANICS' LIENS**, 3; **MORTGAGES**, 11; **MUNICIPAL CORPORATIONS**, 22, 23; **NEGLIGENCE**, 1-3; **PARTITION**; **RAILROADS**, 47, 48; **SPECIFIC PERFORMANCE**, 2; **STATUTES**, 6; **TAXES**, 2.

REALTY.

See **REAL PROPERTY**.

REBUTTAL.

See **NEGLIGENCE**, 6; **RAPES**, 2.

RECEIPT.

See **BILLS OF LADING**, 1.

RECEIVERS.

See **BANKS**, 5.

RECORD.

See **ACKNOWLEDGMENT**, 7, 15; **AGENCY**, 2; **APPEAL**, 6, 7; **CHATTEL MORTGAGES**, 2; **DEEDS**; **EVIDENCE**, 10, 13; **JUDGMENTS**, 1; **LARCENY**, 1; **MORTGAGES**, 4, 7, 8; **MUNICIPAL CORPORATIONS**, 27, 31; **NOTICE**; **PERJURY**, 2, 4.

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REPLEVIN.

REPLEVIN AGAINST OFFICER — DEMAND. — An owner of personal property may maintain replevin, without prior demand, against an officer who has taken it under attachment or execution against a third person in whose possession it was found. *Hopkins v. Bishop*, 480.

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SALES.

1. **CONTRACT OF SALE — CONSTRUCTION.** — When, at the time an agreement is entered into to furnish a quantity of harrow teeth of "regular patterns, such as heretofore furnished," the parties test the quality of the teeth which have been furnished, the agreement must be construed to mean that the teeth to be furnished are to correspond in quality with the teeth theretofore furnished. *Harrow Spring Co. v. Whipple Harrow Co.*, 421.
2. **CONTRACT OF SALE — CONSTRUCTION — EVIDENCE.** — Under a contract by which the seller agrees that shipments of the goods will be made as specified, and that "we will also agree to furnish what additional amounts of the above goods you may require for your season's trade upon the same terms and conditions, but are to have reasonable time and notice in which to fill any additional amount, say about thirty days," the seller must have a reasonable time after the goods are specified or named within which to make the shipment; and although the buyer may show by parol that he gave an order for goods on the day that the contract was made, he cannot vary the terms of the agreement by parol proof that the seller agreed to keep the goods on hand ready for immediate shipment. *Harrow Spring Co. v. Whipple Harrow Co.*, 421.
3. **WHERE DEEMED TO BE MADE.** — If, in the state of the vendee's residence, a contract is made, to the effect that the vendor will ship certain property from another state in original packages, which the vendee, after receiving, shall have ten days to return, if, on examination, they shall prove not satisfactory, any sale resulting from such contract and shipment must be deemed to have been made in the state of the vendee's residence, because it is incomplete until delivery is made there, and he has had an opportunity to examine the property and to elect whether he will keep it or not. *Wasserboehr v. Boulter*, 344.
4. **CONFLICT OF LAWS — ILLEGAL SALES.** — THE PRICE OF ARTICLES sold and delivered in a state where such sale is legal, if nothing remains to be done by the vendor to complete the transaction, can be recovered in a state where such sale is illegal. *Wasserboehr v. Boulter*, 344.
5. **DAMAGES — RECOURPMENT.** — In an action by a seller to recover for goods furnished under a written contract, the buyer may recoup his expenses incurred in making sales in expectation of the delivery of the goods within the time specified in the contract, and which he failed to complete because of the failure of the seller to so deliver. *Harrow Spring Co. v. Whipple Harrow Co.*, 421.
6. **STOPPAGE IN TRANSITU — WHEN NOT DEFEATED.** — When, after freight and wharfage are paid and receipted for, the bill of lading shown but not assigned, and the goods, though upon the wharf at their destination, are not actually delivered by the carrier to the consignee, the right of stoppage *in transitu* still exists, as against a *bona fide* purchaser who has paid value and has delivered the receipted freight and wharfage bills, and an order upon the carrier for the goods. In such case, if part of the goods have been delivered under such order, the right of stoppage in
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transitu still exists as to the remainder undelivered upon the wharf.
Ocean Steamship Co. v. Ehrlich, 164.

7. STOPPAGE IN TRANSITU — HOW DEFEATED, AND WHEN STILL EXISTS. —

The right of stoppage *in transitu* can only be defeated by actual possession in the vendee, or a *bona fide* assignment of the bill of lading; and a custom of the carrier to dispense with the production of the assigned bill of lading, and to deliver the goods to the holder of the receipted bills for freight and wharfage, does not defeat the right of stoppage *in transitu*.
Ocean Steamship Co. v. Ehrlich, 164.

See ACKNOWLEDGMENT, 6, 7; EVIDENCE, 12; FIXTURES; FRAUDULENT CONVEYANCES, 5-8; INTERSTATE COMMERCE; PLEDGE; VENDOR AND PURCHASER.

SALESMEN.

See BAILMENTS, 4, 6.

SATISFACTION.

See EQUITY, 5; EVIDENCE, 12; JUDGMENTS, 6, 2.

SCIRE FACIAS.

A SCIRE FACIAS to revive a judgment is not a new action, but the continuance of an old one. *Rice v. Moore*, 318.

SECURITIES.

See SURETYSHIP, 4, 7.

SEDUCTION.

1. SEDUCTION BY PERSUASION.—Seduction may be accomplished by means of influence and persuasion, intended to reach, and actually reaching, that result, without a promise of marriage or pecuniary advantage. Such effectual persuasion actively causing the seduction may be as distinct a grievance as more venal representations, which appeal to covetousness more than to excited feelings. *Hallock v. Kinney*, 462.

2. SEDUCTION BY PERSUASION — EVIDENCE ESTABLISHING.—In an action for seduction, evidence that the defendant took the plaintiff, a girl sixteen years old, living with her parents, and hitherto chaste, to a dance some distance from her home, that upon their arrival he procured a bedroom for the express purpose of debauching her, and immediately commenced his indecent proposals, and that late at night they left the ball-room and went to the bedroom at his solicitation, where he accomplished his purpose, makes out such a case as should be submitted to the jury under proper instructions. *Hullock v. Kinney*, 462.

SERVICES.

See ATTACHMENT, 1; CONTRACTS, 5; MASTER AND SERVANT; NEGOTIABLE INSTRUMENTS, 8; PARENT AND CHILD, 2.

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See EVIDENCE, 5; JUDGMENTS, 12; JUDICIAL SALE, 2-6; OFFICERS, 1; SUBETYSHIP, 1; TRESPASS, 2; TROVER, 2.

SHIPPING.

DEMURRAGE, DAMAGES IN NATURE OF, RECOVERABLE FROM CONSIGNOR WHEN. — Where no provision is made in a bill of lading for the payment of demurrage by the consignee, damages in the nature of demurrage may be recovered from the consignor in case he detains the vessel for loading for an unreasonable time. *Von Elten v. Newton*, 639.

See INSURANCE, 6.

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See JURISDICTION, 2.

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SPECIFIC PERFORMANCE.

- 1. SPECIFIC PERFORMANCE OF A UNILATERAL CONTRACT** may be decreed, if it is fair, just, and reasonable, and the party sought to be charged has so bound himself as to meet the requirements of the statute of frauds, and the other party has elected to treat the contract as binding, and to enforce it. *Ross v. Parks*, 47.
- 2. SPECIFIC PERFORMANCE. — POSSESSION OF THE REAL PROPERTY,** the title to which complainant seeks to obtain by a bill for specific performance, is not essential to sustain the jurisdiction of the court to award the relief prayed for. *Ross v. Parks*, 47.
- 3. SPECIFIC PERFORMANCE. — A VENDEE OF ONE WHO HAS AGREED TO SELL OR CONVEY REAL PROPERTY** may, unless he is a purchaser in good faith and without notice, be compelled to perform the contract of his vendor. *Ross v. Parks*, 47.

SPOLIATION.

See PLEADING, 1.

STALE DEMANDS.

See LIMITATIONS OF ACTIONS, 2.

STATES.

See ACKNOWLEDGMENT, 10; ATTACHMENT; CHATTEL MORTGAGES; CONTRACTS, 4; CORPORATIONS, 1; COURTS; DEEDS; EQUITY, 2; EVIDENCE, 2; FALSE PRETENSES; HUSBAND AND WIFE, 2; INSOLVENCY, 1; LEGISLATURE, 1; LIMITATIONS OF ACTIONS, 1, 2; MANDAMUS; MORTGAGES, 11; MUNICIPAL CORPORATIONS, 10; RAILROADS, 46; SALES, 2, 4; STATUTES, 2; USURY; WATERCOURSES, 1.

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See RAILROADS, 35.

STATUTE OF FRAUDS.

See CONTRACTS, 1; SPECIFIC PERFORMANCE, 1.

STATUTE OF LIMITATION.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. **CONSTRUCTION OF STATUTE, MATTERS CONSIDERED BY COURT IN.** — For the purpose of construing a statute and ascertaining the intention of the legislature, the courts will look to the whole statute and all its parts, and when such intention is ascertained, it will prevail over the literal import and strict letter of the statute; and where the meaning is doubtful and uncertain, the courts will look into the situation and circumstances under which it was enacted, to other statutes, if there are any upon the same subject, whether passed before or after the statute under consideration, and whether in force or not, as well as to the history of the country, and will carefully consider, in this connection, the purpose sought to be accomplished. *Parving v. Wimberg*, 254.
2. **STATUTE, WHETHER MANDATORY OR DIRECTORY, HOW DETERMINED.** — If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts must hold the statute to be mandatory, whether the particular act in question goes to the merits or affects the result of the election or not. But if a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, it will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits. *Parving v. Wimberg*, 254.
3. **CONSTITUTIONAL LAW — POWER TO ENACT REMEDIAL LEGISLATION IN RESPECT TO STREET-WORK.** — When street-improvement work has been done under a void statute, and the property owners have received the benefits, a subsequent statute providing for the levy and collection of assessments to pay for such work, thus legalizing what the state might previously have ordered, is constitutional and valid. *Douley v. Pittsburgh*, 738.
4. **STREET CROSSINGS, STATUTE AUTHORIZING ASSESSMENT FOR SWEEPING OF, NOT INVALID.** — The fact that a statute authorizing the assessment of property for the sweeping of streets contemplates the sweeping of the crossings does not render it invalid, since it cannot be said that the property owners do not receive a special benefit from keeping them clean. *Reinken v. Fuchring*, 247.
5. **APPEALS — STATUTE, WHETHER RETROACTIVE.** — A statute creating a right of appeal from the decision of a court in granting or denying motions for new trials is not applicable to cases tried before its enactment. *Alabama etc. R. R. Co. v. Hill*, 65.
6. **CONSTITUTIONAL LAW — REMEDIAL LEGISLATION IN RESPECT TO STREET-WORK.** — When street-improvement work has been done under a void statute, and the property owners have received the benefit, a subsequent statute providing for the payment for the work by assessment, and broad enough in its terms to cure such defects as a failure to secure the consent of a majority of such property owners, as required by the void act, and the inclusion in the proceedings of the contract for the setting of curbstones, thus legalizing what the state might previously have ordered, is constitutional and valid. *Whitney v. Pittsburgh*, 740.

See ACKNOWLEDGMENT, 5, 11, 16; AGENCY, 2; ASSOCIATIONS, 1; DEEDS; ELECTIONS, 5, 7; EMINENT DOMAIN; EVIDENCE, 2; EXECUTION, 2, 4; FALSE PRETENSE, 6; INJUNCTIONS, 2; JUDGMENTS, 6; 7; MECHANICS' LIENS, 2, 4; MORTGAGES, 4; MUNICIPAL CORPORATIONS, 1, 2, 9, 12, 24-28; OFFICERS, 2; PARENT AND CHILD, 1; RAILROADS, 33, 43, 45; RAPE, 2; TAXES, 2.

STOCKS.

See CORPORATIONS, 4, 5; DAMAGES, 3; EVIDENCE, 12; PLEDGE.

STOCKHOLDERS.

See CORPORATIONS, 1, 4-6.

STOPPAGE IN TRANSITU.

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See APPURTENANCES; BOUNDARIES, 1; HIGHWAYS; MECHANICS' LIENS, 2-4; MUNICIPAL CORPORATIONS; NEGLIGENCE, 12, 14, 19; RAILROADS, 35-42, 44, 45, 47, 48; REAL PROPERTY, 5; STATUTES, 3, 4, 6.

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See DEBTOR AND CREDITOR; MORTGAGES, 1; SURETYSHIP, 4.

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SUMMONS.

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SUNDAY.

REDEMPTION, LAST DAY FOR, FALLING ON SUNDAY. — Where the last day for redemption is Sunday, it may be made on the next day. Becker v. Pyne, 231.

See TELEGRAPH, 7.

SURETYSHIP.

1. **ESTOPPEL. — A REDELIVERY BOND ESTOPS THE SURETY** from subsequently claiming the property as against the sheriff or the attachment plaintiff, unless the surety was induced to sign the bond by a fraudulent misrepresentation of the facts. A statement by the officer who takes the bond, concerning its legal effect, does not entitle the surety to escape from his bond, or to insist that the property was his. *Peterson v. Woolen*, 327.
2. **PRINCIPAL AND SURETY — SECRET UNDERSTANDING BETWEEN, WHEN AVAILABLE TO ESCAPE LIABILITY ON BOND, AND WHEN NOT. —** A secret undisclosed understanding by a surety in signing a bond will not avail to avoid liability, in the absence of any notice to the obligee of the violation of the condition by the principal; but with notice to the obligee, where the condition has been disregarded in such a manner as to increase the surety's liability, the surety will not be liable. *State v. Allen*, 563.
3. **NOTICE FROM ERASURE OF SURETY'S NAME ON BOND, EXTENT OF. —** The erasure of a surety's signature from a bond, and of his name from the body of the bond, is sufficient to affect the approving authority with notice that the signing was upon condition that other sureties should also sign, and that this condition had been violated, since it is sufficient to suggest inquiry, which, if made, would lead to a knowledge of the facts. *State v. Allen*, 563.
4. **RELEASE OF SURETY — RIGHT TO SUBROGATION. —** When the contract between the surety and the creditor provides for the retention of securities received either from the surety or the principal debtor, a departure from the terms of such contract releases the surety, whether to his detriment or not; but when the surety's right depends upon the doctrine of subrogation, and when the security is not received under any contract to which the surety is a party, the release of a lien upon property by which it is rendered unavailing to the payment of the debt, furnishes a defense to the surety only to the extent of the value of the lien thus lost. *Noble v. Murphy*, 507.
5. **SURETY SIGNING BOND ON CONDITION RELEASED WHEN. —** Where a surety signs a bond upon condition that a certain other solvent surety will also sign it, he will be released, if, without his consent, after the bond is complete, but before its approval, such other surety is released by the principal; and the same result will follow, where the release of such co-surety results by operation of law from the act of the principal in erasing the names of other sureties who have previously signed. *State v. Allen*, 563.
6. **CO-SURETIES ON BOND RELEASED BY RELEASE OF SURETY WHEN. —** Where a bond is signed by sureties upon the condition that it is to be circulated for other signatures, and not be delivered until signed by solvent sureties to a specified amount, and after sureties to that amount are obtained, the signature of one of them is erased by the principal, the condition and its violation being known to the approving authority before the approval of the bond, the sureties who signed upon such condition, but who did not consent to such erasure, will be thereby released. *State v. Allen*, 562.
7. **APPLICATION OF SECURITY. —** When a creditor, holding several notes against his debtor, with notice that one of them is signed by a surety, takes a mortgage from the debtor as security for all the notes, without any designation as to the application of the proceeds of

the security, he has a right to apply such proceeds in payment of the notes other than the one secured by the contract of suretyship, and greatly exceeding in amount the value of the security; and if, before the maturity of the mortgage, and after accepting a deed to the land upon which it is given, the creditor sells the land, and so applies the proceeds, the surety is not thereby damaged, and remains liable on the note signed by him as surety. *Noble v. Murphy*, 507.

9. **NEGLECT TO APPLY SECURITIES.** — If the maker of a note gives a chattel mortgage to secure its payment, the fact that the mortgagor disposes of some of the mortgaged chattels, and the mortgagee takes no measures to recover them, does not release the surety on the note if the mortgagee consented to the disposition of the property by the mortgagor. *Thorn v. Pinkham*, 335.

9. **Agreement to retain the maker of a note in the payee's employment** "so long as he does well," and to credit a certain portion of his wages on the note, does not release the sureties thereon, when the maker is discharged from service before the note becomes due, and the time of payment is never extended beyond the maturity of the note. *Thorn v. Pinkham*, 335.

10. **INCREASE OF DUTIES OF PRINCIPAL.** — The fact that a bank cashier, after giving a bond as such, assumes to keep the individual ledger of the bank without notice to his sureties of such additional duty, is not such a change or modification of his duties as cashier as will of itself discharge such sureties from their undertaking for his faithful performance of his official duties as cashier. *Shackamaxon Bank v. Yard*, 807.

11. **DEATH OF SURETY AS REVOCATION OF.** — When a contract of suretyship is binding upon heirs, executors, and administrators during the employment of the principal in a particular office, it is not revoked by the death of the surety, and his estate is still bound, although the principal is not regularly re-elected to that office, but continues to perform the duties thereof without re-election. *Shackamaxon Bank v. Yard*, 807.

12. **CHANGE OF DUTIES OF PRINCIPAL. — TO DISCHARGE A SURETY** by a change in the duties of the principal, the change must be such as to interfere with or modify the duties for the faithful performance of which the surety is bound, so as to make it inequitable to enforce his undertaking upon a state of facts not within the contemplation of the parties, and not consented to by the surety. *Shackamaxon Bank v. Yard*, 807.

See **BANKS**, 2; **CORPORATIONS**, 4.

SURVEYOR.

See **MUNICIPAL CORPORATIONS**, 23.

SURVEYS.

See **BOUNDARIES**.

SWEEPING STREETS.

See **MUNICIPAL CORPORATIONS**, 13, 14; **STATUTES**, 4.

TAXES.

1. **TAXES AND ASSESSMENTS, DISTINCTION BETWEEN.** — There is a clear distinction between taxes and assessments. Taxes are impositions for purposes of general revenue; assessments are special and local impositions

upon property in the immediate vicinity of an improvement for the public welfare, which are necessary to pay for the improvement, and laid with reference to the special benefits which such property derives from the expenditure. *Reinken v. Fuehring*, 247.

2. **PROPERTY OWNER ASSESSED MAY ALSO BE TAXED GENERALLY.** — Since a property owner assessed for the expense of sweeping the street in front of his lot is fully compensated for his outlay in the enhanced value of his property, he may be taxed generally, also, with the balance of the public for cleaning other streets in which the public alone have an interest, and which cannot be swept as the streets upon which his property abuts. *Reinken v. Fuehring*, 247.
 3. **CONSTITUTIONAL LAW — TAX SALES — EXTENDING TIME OF REDEMPTION.** — A purchase of land by a private party at tax sale is a contract, which, together with the right of redemption therefrom, is governed by the law in force at the time of the sale, and the time for redemption can neither be shortened nor extended by subsequent legislation. *Hull v. State*, 95.
- See **FRAUDULENT CONVEYANCES**, 3; **MUNICIPAL CORPORATIONS**, 13, 27, 28.

TELEGRAPHS.

1. **PLEADING.** — A complaint alleging that the defendant was a public telegraph corporation, and that W. J. Wilson, for the benefit and as the agent of the plaintiff, delivered to the defendant the following message: "Howard, Ga., April 27, '90. To W. L. Wilson, Childersburg, Ala. Father died this P. M. Come at once. W. J. Wilson," — for transmission to plaintiff by telegraph, and that plaintiff's said agent paid defendant the price of such transmission, that such message was promptly transmitted to defendant's office to which it was addressed, but was not delivered until after the lapse of the day on which it should have been delivered, sufficiently discloses a contract between plaintiff and defendant, for the breach of which at least nominal damages are recoverable. *Western Union Tel. Co. v. Wilson*, 23.
2. **A PERSON TO WHOM A TELEGRAM IS ADDRESSED** may recover damages for delay in its transmission or delivery if the sender was acting as his agent and the corporation had notice of that fact. *Western Union Tel. Co. v. Wilson*, 23.
3. **FAILURE TO DELIVER TELEGRAPH MESSAGE, EVIDENCE INSUFFICIENT TO EXCUSE.** — In an action against a telegraph company for failure to transmit and deliver a message, evidence that the operator, upon ascertaining that the company had no office at the place to which it was to be sent, procured it to be sent by telephone, is inadmissible to establish a defense, where the telephone message was not delivered. *Western Union Tel. Co. v. Jones*, 579.
4. **TELEGRAPH COMPANY BOUND TO SEND MESSAGE NOT WRITTEN ON ITS BLANKS WHEN.** — Where a message is received by the operator of a telegraph company and paid for by the sender, the company is bound to transmit it, although it is written on paper other than its usual blanks. *Western Union Tel. Co. v. Jones*, 579.
5. **TELEGRAPH OPERATOR BOUND TO KNOW TO WHAT PLACES MESSAGES CAN BE SENT.** — It is within the apparent scope of a telegraph operator's agency to know to what places a message can be sent; and if he receives a message to be sent to a place through which the company's line runs, and takes payment for it, agreeing to send it, the company will be liable

for failure to transmit and deliver it, although it has no office or agent at that place. *Western Union Tel. Co. v. Jones*, 579.

6. **STATUTORY PENALTY FOR FAILURE TO TRANSMIT TELEGRAPH MESSAGE APPLIES WHEN.** — The penalty prescribed by statute for failure to transmit and deliver telegraph messages promptly applies in every case where the company is under an obligation to do these things. *Western Union Tel. Co. v. Jones*, 579.

7. **SUNDAY.** — A TELEGRAPH CORPORATION CANNOT ESCAPE LIABILITY for the failure to promptly deliver a telegram on the ground that the contract for its transmission and delivery was entered into on Sunday, if the emergency to which the telegram related was the death and burial of the father of the person to whom it was addressed. *Western Union Tel. Co. v. Wilson*, 23.

8. **DAMAGES FOR MENTAL SUFFERING** arising from the failure to promptly transmit a telegram can be recovered, provided there was other ground of damage, either nominal or substantial, though an action cannot be sustained for mental suffering alone. *Western Union Tel. Co. v. Wilson*, 23.

9. **LIABILITY FOR DAMAGES FOR MENTAL SUFFERING.** — A person to whom a telegraphic message is sent announcing the dying condition of his brother, but by the gross negligence of the company not delivered with due promptness, so that he is unable to reach the bedside of his brother until after the death of the latter, cannot recover substantial damages for mental suffering alone, caused by the company's failure of duty. *Chapman v. Western Union Tel. Co.*, 183.

TENANTS IN COMMON.

See CO-TENANCY.

TENDER.

See MORTGAGES, 6, 7.

TESTIMONY.

See EVIDENCE.

THEFT.

See BAILMENTS, 2; BANKS, 15; LARCENY.

TOWN ORDERS.

See NEGOTIABLE INSTRUMENTS, 1, 4.

TOWNS.

See HIGHWAYS, 2-5; MUNICIPAL CORPORATIONS.

TOWNSHIPS.

See MUNICIPAL CORPORATIONS, 27.

TRANSFER.

See CORPORATIONS, 6, 7; NEGOTIABLE INSTRUMENTS, 5, 6.

TRESPASS.

1. **WHAT CONSTITUTES.** — A brother who assists his sister and acts under her direction in forcibly removing the household goods of her husband from the house of the latter is liable to him in trespass therefor. *Barnes v. Kirkpatrick*, 485.
2. **TRESPASS AGAINST SHERIFF FOR WRONGFUL SALE.** — One who acquires title to property after levy and before sale may maintain trespass against a sheriff for wrongfully selling it as the property of another, with notice of its true ownership. *Kitchen v. McCloskey*, 811.
See LARCENY, 2; WITNESSES, 8.

TRESPASSERS.

See RAILROADS, 31, 32, 36.

TRIAL.

1. **A MOTION TO POSTPONE A TRIAL TO A LATER DAY OF THE TERM** is addressed to the unreviewable discretion of the trial court. *Alabama etc. R. R. Co. v. Hill*, 65.
2. **TESTIMONY COMPETENT FOR ANY PURPOSE NOT EXCLUDED ON GENERAL OBJECTION.** — Where testimony is competent for any purpose, it will not be excluded on a general objection. *Mississippi Mills Co. v. Smith*, 546.
3. **EVIDENCE — RIGHT TO EXPLAIN EXECUTION OF MORTGAGE.** — When a chattel mortgage executed by defendant to plaintiff, and tending to support the claim of the latter, is called to the attention of the defendant, on his cross-examination, by showing it to him, he cannot be deprived of the right to explain its execution by a refusal on the part of the plaintiff to offer it in evidence, and after such explanation is made, it is error to refuse to receive it in evidence. *Williams v. Clink*, 443.
4. **APPELLATE PRACTICE — IF ERRONEOUSLY ADMITTED EVIDENCE MIGHT HAVE MISLED** the jury, and caused them to hold defendant liable to damages which they might not otherwise have felt authorized to impose, its admission cannot be presumed to have been error without injury. *Central R. R. etc. Co. v. Vaughan*, 50.
5. **JURY TRIAL. — INSTRUCTION THAT IF THE JURY WERE IN DOUBT AND UNCERTAINTY** as to certain facts essential to the plaintiff's case they should find against him may be refused without committing error. The mind may be reasonably satisfied of a given fact, and yet not certain of it nor free of doubt in respect to it. *Alabama etc. R. R. Co. v. Hill*, 65.
6. **JURY TRIAL — INSTRUCTIONS.** — A trial court is under no obligation to single out the testimony of one or more witnesses and instruct the jury to reach certain conclusions if such testimony be believed. *Alabama etc. R. R. Co. v. Hill*, 65.
7. **JURY TRIAL — INSTRUCTIONS SHOULD BE CONSIDERED AS A WHOLE.** — The general charge given in a trial court should be read and construed with regard to the connection between its several sentences and provisions, and if any part, when so considered, limited, or expanded, asserts the law correctly, it will not furnish ground for reversal, however faulty a particular clause may be, if its meaning were not controlled by a prior or subsequent passage. *Alabama etc. R. R. Co. v. Hill*, 65.
8. **JURY TRIAL — WHETHER A WITNESS SHALL BE PERMITTED TO BE RECALLED** by the plaintiff for the purpose of allowing a predicate for his

Impeachment by proof of contradictory statements, is a matter of discretion not reviewable on appeal. *Richmond etc. R. R. Co. v. Vance*, 41.

9. **JURY TRIAL — WITNESSES, PREPONDERANCE OF.** — Instruction that the jury are not to be controlled by the mere numerical preponderance of witnesses on one side or the other, but should consider such preponderance along with other facts and circumstances conducing to credence, or the reverse, is proper. *Alabama etc. R. R. Co. v. Frazier*, 28.

10. **JURY TRIAL — WITNESSES FALSE IN ONE PARTICULAR.** — Instruction that if the jury believe from the evidence that certain witnesses swore falsely in one particular, they were authorized to disregard the evidence of such witnesses entirely, is proper, when it appears that all the evidence of such witnesses was material. *Alabama etc. R. R. Co. v. Frazier*, 28.

11. **JURY TRIAL.** — A court has no right to send an answer to the jury-room to a question propounded in writing to him by the jurors, after they have retired to deliberate upon their verdict, without the consent of counsel in the case. *Hopkins v. Bishop*, 480.

12. **JURY TRIAL — IMPROPER REMARKS OF COUNSEL** do not of themselves constitute any ground of review in an appellate court, though they were excepted to when made, unless the trial court was requested to take some action, and erred in refusing or granting the request. *Lunsford v. Dietrich*, 79.

13. **JURY TRIAL — IMPROPER REMARKS OF COUNSEL** cannot be complained of, if they were necessitated by like remarks of his adversary. *Alabama etc. R. R. Co. v. Hill*, 65.

14. **IN MAKING AN ORDER FOR THE PHYSICAL EXAMINATION OF A LITIGANT** suing to recover for personal injuries, and in designating the expert to execute it, the court exercises a discretion which neither party has any right to control, and neither is entitled to suggest an expert and insist upon his selection by the court. *Alabama etc. R. R. Co. v. Hill*, 65.

See APPEAL; CORPORATIONS, 7; DAMAGES, 7, 10; EVIDENCE; JUDGES, 1; LARCENY, 2; LIBEL, 6; MASTER AND SERVANT, 8; MISTAKE, 1; NEGLIGENCE, 9, 10, 14, 17; NEW TRIAL; PERJURY, 3, 4; RAILROADS, 42; REAL PROPERTY, 5; SEDUCTION, 2; WITNESSES.

TROVER.

1. **TO CONSTITUTE A CONVERSION**, there must be a tortious detention of personal property from the owner, or its destruction, or an exclusion or defiance of the owner's right, or a withholding of the possession under a claim of title inconsistent with that of the owner. *Terry v. Birmingham Nat. Bank*, 87.

2. **TROVER FOR EXEMPT PROPERTY — SUFFICIENCY OF DECLARATION.** — In an action of trover against a sheriff for the conversion of exempt property seized under execution, an allegation in the declaration that such sheriff, by his deputy or agent, naming him, did convert and dispose of the property, is sufficient to charge the sheriff; and in such case the usual declaration in trover is sufficient to enable the plaintiff to show such facts as are necessary for the recovery of such exempt property. *Hutchinson v. Whitmore*, 431.

See FIXTURES.

TRUST DEEDS.

See INJUNCTIONS, 2.

TRUSTS.

1. **LIABILITY OF MUNICIPALITY UNDER VOID TRUST.** — When a municipal corporation receives a legacy upon a trust which is void, the trust fund is not impressed in the hands of the city with a trust in favor of the residuary legatees or the representatives of the testator, and the city, by virtue of its acceptance of the trust, does not become their trustee, and, as such, liable to account to them in the orphans' court. *Benjamin Franklin's Estate*, 817.
 2. **MUNICIPAL CORPORATION AS TRUSTEE.** — In the absence of an express grant of power to accept and hold property upon purely private trusts, and to execute them, a municipal corporation has no power to do so. That the trust is a resulting one, and the consequent duties of the trustee are not necessarily dependent upon the intention either of the donor or trustee, but may be implied independently of and contrary to both, does not militate against this proposition. *Benjamin Franklin's Estate*, 817.
 3. **MUNICIPAL CORPORATION AS TRUSTEE.** — The law will not resort to a fiction that will defeat its own policy, by converting into a trustee a municipal corporation from which it has, for the public good, withheld capacity to accept and administer the trust. *Benjamin Franklin's Estate*, 817.
 4. **PERPETUITIES — TRUST CREATED BY WILL.** — When a testatrix, by her will, bequeaths her property to her children, share and share alike, subject to the control of her son, whom she appoints her executor and trustee to manage the property, collect the income, sell the real estate at private or public sale, and when two thirds of the persons interested in the estate shall so demand, to sell the property and divide the proceeds among those interested under the provisions of the will, an active trust is thereby created, for a lawful purpose, not in conflict with the law in respect to perpetuities. *Cooper's Estate*, 829.
 5. **BANKS AND BANKING — DEPOSIT BY TRUSTEE AS AGENT — RIGHT TO RECOVER — PARTIES.** — When a trustee deposits money in bank to his credit as agent, and the bank refuses to pay his check, he may sue the bank, to recover the deposit, as trustee individually, or he may join the beneficiaries in an action to recover it. *Munneryn v. Augusta Sav. Bank*, 159.
 6. **BANKS AND BANKING — DEPOSIT BY TRUSTEE AS AGENT — CONVERSION.** — A deposit of money in bank by a trustee to his credit as agent is not a conversion of the fund, although the bank may know of the existence of the trust. *Munneryn v. Augusta Sav. Bank*, 159.
- See ATTORNEY AND CLIENT; BANKS, 7-9; CORPORATIONS, 6, 7; DEVER, 1; FRAUD, 4; MORTGAGES, 2.

ULTRA VIRES.

See CORPORATIONS, 2, 3; NEGOTIABLE INSTRUMENTS, 4.

UNITED STATES.

See APPEAL, 1; REAL PROPERTY, 3; WATERCOURSES, 1.

USURY.

USURIOUS CONTRACT, BY WHAT LAW GOVERNED. — The laws of this state and access to its courts cannot be made the subject of contract. *Id.*

therefore, a contract for the loan of money is usurious under the laws of another state, by which it is governed, the courts of this state will not respect a stipulation in the contract to the effect that if litigation shall arise, it shall be governed by the laws of this state, even though such loan is secured by a mortgage on land situated in this state. *American Freehold etc. Co. v. Jefferson*, 587.

See ACCOUNTS; CONTRACTS, 10; EQUITY, 3; PLEADING, 2.

VACANCY.

See OFFICERS, 2-4.

VENDOR AND PURCHASER.

1. AN OFFER CONTAINED IN AN OPTION cannot be withdrawn or revoked within the time designated therein. *Ross v. Parks*, 47.

2. AN OPTION given by the owner of land for a valuable consideration, whether adequate or not, agreeing to sell it to another at a fixed price if accepted within a specified time, is binding upon the owner and all his successors in interest with knowledge thereof. *Ross v. Parks*, 47.

See BOUNDARIES; EQUITY, 4; FIXTURES; FRAUDULENT CONVEYANCES, 3; INJUNCTIONS, 2; RAILROADS, 34; SPECIFIC PERFORMANCE, 2.

VERDIOT.

See APPEAL, 2, 3; DAMAGES, 7.

VESSELS.

See SHIPPING.

VESTED RIGHTS.

See ACKNOWLEDGMENTS, 15; ASSOCIATIONS, 2.

VILLAGES.

See MUNICIPAL CORPORATIONS, 29-31.

VOLUNTEERS.

See LIENS, 2.

VOTERS.

See ELECTIONS.

WAGES.

See ATTACHMENT; MASTER AND SERVANT, 1, 2, 4.

WAIVER.

See CONTRACTS, 9; EVIDENCE, 10; PERJURY, 3, 4; PROCESS, 2.

WAREHOUSEMEN.

NEGLECT OF A WAREHOUSEMAN IS NOT ESTABLISHED BY PROOF OF A FIRE, and the destruction thereby of goods stored with him. *Railroad v. Kelly*, 902.

See RAILROADS, 6.

WATER COMPANIES.

1. A REGULATION OF A WATER COMPANY that one year's rent will be required in all cases, payable in advance, on the first day of July of each year, is not reasonable, and cannot be enforced, and therefore a year's rent cannot be collected of one who has used water a few months. *Rockland Water Co. v. Adams*, 368.
2. CONTRACT TO PAY FOR WATER ACCORDING TO THE REGULATIONS OF A WATER COMPANY will not be implied from knowledge of such regulations if they are unreasonable, and cannot be enforced against persons not assenting thereto. *Rockland Water Co. v. Adams*, 368.
3. PRIVACY OF CONTRACT. — When a city makes a contract with a water company to furnish water to extinguish fires, there is no privity of contract between such company and the residents of the city, and the latter, therefore, cannot recover of the company for damages resulting from a breach of its contract, though one of the stipulations of the contract is that the company will pay all damages that may accrue to any citizen of the city by reason of the failure on the part of the company to supply a sufficient amount of water, or a failure to supply water at a proper time, or by reason of any other negligence. *Mott v. Cherrysale Water etc. Co.* 267.

WATERCOURSES.

1. POWER TO IMPROVE NAVIGABLE WATERS VESTED IN UNITED STATES. — The power to improve rivers and arms of the sea, forming the highways of commerce, is vested in the government of the United States, and if Congress provides for the exercise of such power in a manner complete, according to that government's judicial test, it must be regarded as equally complete in every state in which such power is exercised. *Banner v. Atlantic Dredging Co.*, 649.
2. GRANT OF LAND BOUNDED ON SMALL INLAND LAKE EXTENDS TO ITS CENTER. — In the state of New York, the presumption is, that land under the waters of small inland non-navigable lakes and ponds belongs to the proprietors of the adjoining lands, and in the construction of grants of land bordering and bounded on such waters the same rule is applied that is applicable to conveyances bounding lands on fresh-water streams. And therefore a conveyance of land bordering on such a lake or pond, which describes it as running to the pond, or to some monument on the land at the water, and thence along the pond to another monument on its bank, unless restricted by express words or otherwise, carries the title to the center of the pond; and the fact that the lines along the pond are described by courses and distances running from one monument on the bank to another, and that the length of these lines is the distance between the monuments, is no evidence of an intent to restrict the grant so as to exclude the bed of the pond. *Gouverneur v. National Ice Co.*, 669.
3. CONVEYANCES — DESCRIPTION. — A CONVEYANCE DESCRIBING A BOUNDARY LINE AS BEGINNING AT THE SEA, and then, after various calls, as running to the shore, includes the shore to low-water mark. *Snow v. Mt. Desert Island etc. Co.*, 331.
4. WATERCOURSES — RIGHT BY PRESCRIPTION TO POLLUTE WATERS OF STREAM, NOW LIMITED. — The right acquired by prescription to pollute the waters of a stream is limited by the character and extent of the right exercised during the period of prescription, and for any increase

causing material injury to the riparian owners an action may be maintained. *Mississippi Mills Co. v. Smith*, 546.

5. **MANUFACTURER NOT EXEMPT FROM LIABILITY FOR POLLUTING STREAM BY ARTIFICIAL MEANS.** — A manufacturing company has no more right than any other person to pollute, by artificial means, the waters of a stream, without liability to persons having a right to the use of the water flowing therein. *Mississippi Mills Co. v. Smith*, 546.

See DAMAGES, 7; REAL PROPERTY, 2.

WATER-WORKS BONDS.

See MUNICIPAL CORPORATIONS, 29-31.

WHARVES.

1. **PUBLIC PIERS, PERSONS CONTROLLING, BOUND TO EXERCISE SAME CARE FOR SAFETY OF PUBLIC AS THOSE USING PUBLIC STREETS.** — The same duty to exercise care for the safety of the public and of all persons having occasion to use public piers is due from those in control of such piers as from those using public streets, since both are public ways. *Oceanic Steam Nav. Co. v. Compania Transatlantica Española*, 685.

See SALES, 6, 7.

WILLFUL WRONG.

See RAILROADS, 14, 22, 25.

WILLS.

1. **WHAT MAY CONSTITUTE.** — An instrument in the form of a letter from a person in his last illness to his attorney, requesting the latter to draw a will in accordance with instructions therein set forth, and containing all the requisites of a will as to the disposition of property, may be established as a will by proof of its due execution and publication by the testator as such. *Scott's Estate*, 713.
2. **WHAT MAY CONSTITUTE — EVIDENCE OF PUBLICATION.** — When a person, during his last illness, causes a letter to be written to his attorney, with directions to him to draw a will in accordance with instructions therein contained, and such instrument contains all the requisites of a valid will as to the disposition of property, is signed by the testator as such, and by the person writing the body of it as a subscribing witness, parol evidence is admissible to show that the testator declared and intended the instrument to be his last will and testament. *Scott's Estate*, 713.
3. **WHAT MAY CONSTITUTE — EVIDENCE OF PUBLICATION.** — When a person, during his last illness, writes a letter to his attorney, directing him to draw a will in accordance with instructions therein contained, and such instrument contains all the requisites of a will as to the disposition of property, is signed by the testator and by one subscribing witness, a son of the testator, who is acquainted with all the circumstances under which the instrument was drawn, and to whom the testator has declared it to be his last will, is competent to prove its publication as such, and thus supply the place of one attesting witness, provided its execution is duly proved, although he did not see it after it was prepared and executed. *Scott's Estate*, 713.
4. **EXECUTION AND ATTESTATION OF.** — It is not necessary that a subscrib-

ing witness should see the testator sign the will, nor that he should subscribe it in the presence of the other witness. *Simmons v. Leonard*, 875.

5. **A WILL MUST BE SUBSCRIBED BY AT LEAST TWO DISINTERESTED WITNESSES.** *Simmons v. Leonard*, 875.
6. **WITNESS UNABLE TO WRITE. — ATTESTATION OF A WILL BY A SUBSCRIBING WITNESS MUST BE** either by signing his name or by making his mark, when his name is written by another for him. It is not sufficient that his name was written by another for him, though at his request and in his presence, if he did not make his mark thereto. *Simmons v. Leonard*, 875.
7. **A SUBSCRIBING WITNESS MUST BE ABLE TO IDENTIFY THE WILL.** Hence, if he did not see it nor hear it read, nor impress his name upon it, nor make any other mark by which, if remembered, he might recognize it, there can be no valid subscription. It is not sufficient that the will be identified by a person, other than the witness, from some mark which such other person placed upon it. *Simmons v. Leonard*, 875.
8. **WITNESS'S NAME SIGNED FOR HIM BY INCOMPETENT PERSON. —** One competent to be a subscribing witness to a will cannot perform the act of subscription by another, who is legally incompetent to be a witness. Hence, if the name of a witness is subscribed by a devisee, such subscription is void. *Simmons v. Leonard*, 875.
9. **ATTESTATION AND PUBLICATION. —** Circumstances may supply the want of one witness to a will, provided they go directly to the immediate act of disposition. *Scott's Estate*, 713.
10. **THE WILL MUST BE SIGNED BY THE TESTATOR BEFORE** there can be any valid attestation or subscription, but it need not be signed in the presence of either witness, nor need either actually see the testator's signature. It is sufficient that the will be produced, signed by the testator, and in such a way that his signature may be seen by the witnesses, and that he request them to witness it as his will. *Simmons v. Leonard*, 875.

See ASSOCIATIONS, 3; DEVISE; LEGACY.

WITNESSES.

1. **CO-DEFENDANTS — RIGHT TO PLACE UNDER THE RULE. —** If, during the trial of two persons charged with crime, they announce their purpose to testify as witnesses, each for himself, neither can be placed under the rule, and excluded from the room during the examination of the other. *Richards v. State*, 907.
2. **COMPETENCY OF WIFE. —** In an action by a husband for carnally debauching and knowing his wife and alienating and destroying her affection for him, she is not a competent witness in his behalf. *Reynolds v. Schaffer*, 492.
3. **EVIDENCE OF PERMANENCY OF INJURIES. —** One who was injured nearly two years before the trial, and whose injuries are of such a character as to be known to him, though he is not an expert, is competent to testify as to whether he was permanently injured or not. *Alabama etc. R. R. Co. v. Frasier*, 28.
4. **EXPERT EVIDENCE SHOULD BE RESTRICTED** to those cases where its use is wellnigh indispensable because of questions of science or skill being involved, in which a special and peculiar knowledge is desired, in order to arrive at the exact truth. *McNally v. Colwell*, 494.

5. **FIRE — LIABILITY OF MILL-OWNER — EXPERT EVIDENCE.** — In an action to recover for damages to surrounding property, caused by accidental fire originating in a saw-mill, no special or particular knowledge beyond that presumably open to a jury in a lumbering country is required to determine what means would be safe or ordinarily prudent to be used to put out fires in a boiler-room or saw-mill in a particular case, and expert evidence on this subject is inadmissible. *McNally v. Cohoell*, 494.
6. **EVIDENCE OF EXPERTS, EFFECT TO BE GIVEN.** — If a jury reach a given conclusion from a consideration of the whole evidence, including as well the opinion of experts as substantive facts deposed to by witnesses, whether experts or not, they are not to surrender this conclusion because the opinions of experts do not coincide with theirs. In other words, the jury need not substitute for their own views of what is established by the whole evidence the conclusion stated by the experts. *Alabama etc. R. R. Co. v. Hill*, 65.
7. **EVIDENCE — EXPERTS.** — If a physician testifying as an expert with reference to plaintiff's physical condition stated that much of her pain was caused by the condition of the coccyx-bone, and that this condition could be cured by a surgical operation to which he did not deem himself equal, it is not error to overrule a question calling for the reasons which actuated his omission to call in a surgeon to remove such bone. *Alabama etc. R. R. Co. v. Hill*, 65.
8. **EVIDENCE — CROSS-EXAMINATION OF WITNESS.** — In an action of trespass by a husband against his wife's brother for helping her in forcibly removing household goods from the husband's house, statements made by the wife at the time of the removal, but not in the presence of her husband, cannot be drawn out on the cross-examination of a witness who has not testified to any conversation with the wife. *Burns v. Kirkpatrick*, 485.
- See **ACKNOWLEDGMENT**, 4; **EVIDENCE**, 6, 11; **JUDGES**, 1; **RAILROADS**, 7; **TRIAL**, 6, 8-10.

WORDS AND PHRASES.

See **DEFINITIONS**.

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